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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 477

BARKER PAINTING COMPANY, PETITIONER,

vs.

LOCAL No. 734, BROTHERHOOD OF PAINTERS, DECORATORS, AND PAPERHANGERS OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 6, 1929

CERTIORARI GRANTED DECEMBER 9, 1929

(34,608)

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IN THE

District Court of the United States

FOR THE DISTRICT OF NEW JERSEY.

IN EQUITY. No. 1160.

BARKER PAINTING COMPANY,

v.

LOCAL No. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, GEORGE W. HOFFMAN AND HARRY S. WARREN.

DOCKET ENTRIES.

Mar. 16, 1925.	Bill of Complaint filed.
" " "	Order to Show Cause why Injunction should not issue and restraint filed.
" " "	Bond filed.
" 19, "	Subpœna issued.
" 23, "	Affidavits of Service filed (2).
" 25, "	Order continuing hearing filed.
" 27, "	Subpœna returned, served Mar. 26, and filed.
" 30, "	Order of Continuance of Order to Show Cause, filed.
Apr. 15, "	Answer filed.
" 18, "	Replication filed.

May	8, 1925.	Final hearing. Adjourned to May 22.
"	22, "	Final hearing. Decision reserved.
June	29, "	Final hearing. Final Argument. Decision reserved.
Apr.	14, 1926.	Opinion filed.
"	19, "	Order denying motion for Injunction and discharging Order to Show Cause, &c. filed.
Mar.	7, 1928.	Order extending Term filed.
"	23, "	Final Decree dismissing Bill with Costs filed.
June	4, "	Order extending Term filed.
"	" "	Petition for Appeal and Notice of Appeal filed.
"	" "	Order allowing Appeal filed.
"	" "	Citation issued.
"	" "	Citation returned, service acknowledged. Copy filed.
"	8, "	Stipulation as to Bond filed.
"	" "	Bond on Appeal filed.
Sept.	1, "	Order Extending Time of Term filed.
		C L O S E D
Nov.	6, 1928.	Order Extending Time of Term filed.
Feb.	21, 1929.	Order Extending Time of Term filed.

TRANSCRIPT OF THE RECORD AND BILL OF EXCEPTIONS.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF NEW JERSEY.

IN EQUITY. No. 1160.

BARKER PAINTING COMPANY,
Plaintiff-Appellant,

v.

LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA; BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA; GEORGE W. HOFFMAN AND HARRY S. WARREN,
Defendants-Appellees.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } *ss.:*

BE IT REMEMBERED, that in the United States District Court for the District of New Jersey, at the time hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause to wit:

BILL OF COMPLAINT.

(Filed March 16, 1925.)

To the Honorables, the Judges of the United States District Court for the District of New Jersey:

1. Plaintiff, Barker Painting Company, is a corporation organized and existing under the laws of the State of New York. It is a resident, citizen and inhabitant of the State of New York, and is not a resident, citizen and inhabitant of the State of New Jersey.

2. Defendant, Brotherhood of Painters, Decorators and Paper Hangers of America, is a voluntary organization of the State of Indiana and is a resident, citizen and inhabitant of the State of Indiana and is not a resident, citizen and inhabitant of the State of New York. Defendant, Local No. 734, Brotherhood of Painters, Decorators and Paper Hangers of America, is a local of the Brotherhood of Painters, Decorators and Paper Hangers of America and is a resident, citizen and inhabitant of the State of New Jersey and is not a resident, citizen or inhabitant of the State of New York. Defendants, George W. Hoffman and Harry S. Warren, are each of them residents, citizens and inhabitants of the State of New Jersey and are not residents, citizens or inhabitants of the State of New York.

3. Plaintiff, Barker Painting Company, is and has been for the past fourteen years engaged in the business of interior and exterior painting and decorating and its business extends and has for some years extended throughout the United States and Canada. It has at the present time painting and decorating in the States of New Jersey, New York, Pennsylvania, Connecticut and District of Columbia. It now has and has for some years past maintained in the City of New York a warehouse where it stores material, including paints, oils, colors, varnishes, tools, etc., and as it gets work to do in different states it ships said materials, oils, varnishes, tools, etc., to the various places in the various states from its warehouse in New York; it likewise purchases for use upon the various jobs in different states other than New York, materials, including paints, oils, varnishes, etc., in New York and causes these materials to be shipped to the respective works in different states. It has an investment in its

business of approximately $160,000, and does a business of approximately $800,000 to a $1,000,000 a year.

4. There is and has been for some years last past an unincorporated voluntary organization in Indiana, known as the Brotherhood of Painters, Decorators and Paper Hangers of America, said Brotherhood of Painters, Decorators and Paper Hangers of America is made up of various districts and locals located throughout the United States, which districts or locals located throughout the United States, which districts or locals have representation in the international association which has its headquarters at Lafayette, Indiana. At the present time and for some years past the design and purpose of the Brotherhood of Painters, Decorators and Paper Hangers of America has been to compel employers of labor engaged in building operations such as that upon which complainant is engaged to employ none but members of said Brotherhood of Painters, Decorators and Paper Hangers of America. There are also at the present time and have been for some years last past other voluntary organizations known as the United Brotherhood of Carpenters and Joiners of America, with its headquarters in the City of Indianapolis, State of Indiana, which assumes jurisdiction over those engaged in carpenter work upon structural operations; the National Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, which assumes jurisdiction over all those engaged in transportation by means of horses or motor cars. There are other voluntary organizations of similar kind which have jurisdiction over those engaged in different lines of work upon building construction. As a matter of fact there is an International Labor Organization for every class of work engaged upon building construction throughout the United States. All of these organizations, including the

Brotherhood of Painters, Decorators and Paper Hangers of America are affiliated with the American Federation of Labor, one of the purposes of which is to compel the employment by all employers of labor throughout the United States and Canada of persons who are members of some one of these subordinate unions, and the result of the success will be to prevent the employment of any person who is not a member of one of the subordinate labor organizations in any line of endeavor throughout the United States and Canada.

5. The labor organizations as aforesaid operate through locals and district councils. The Brotherhood of Painters, Decorators and Paper Hangers of America are represented in district of New Jersey in the territory including Somerville, N. J., by local No. 734, of the Brotherhood of Painters, Decorators and Paper Hangers of America, and that local claims to have jurisdiction of all persons engaged in the business of working upon painting or interior decorating within the territory of Somerville. The said unions having to do with building operations are also represented by members upon a council known as a Building Trades Council, which said council is made up of representatives from the various labor organizations having to do with building operations, and complainant says that it is the purpose of all those labor organizations, National and subordinate, to compel the employment of none but union labor in the United States, to exclude non-union labor from employment absolutely and to compel all employers of labor to govern their course of conduct by rules and regulations promulgated by said unions and to take away from the employer the right to conduct his business. The building trades in New Jersey, including Somerville and extending over the entire Metropolitan District, which includes the City of New York, and the Northern part of New Jer-

sey, including Somerville, are thoroughly unionized, and there is and has been for some years past an agreement between the various unions engaged in the building operations therein, that in case any employer of labor upon any particular job is in difficulty with the union and employs non-union men or otherwise operates in violation of the terms and conditions prescribed by the union, not only members of the particular union concerned refuse to work for the said employer or upon said job, but all other union men employed upon the said job or any other job upon which the said employer in conflict with the union may be employed, will refuse to proceed with the work, with the result that all work upon which the employer may be engaged will cease. This method of coercion and intimidation has been the method pursued by the said unions for some years past, is well understood and has a coercive and intimidative effect upon all persons desiring construction work to be performed and upon all classes of labor.

6. There is a rule of the Brotherhood of Painters, Decorators and Paper Hangers of America that no workman shall come from a foreign district without obtaining from the union of the local having jurisdiction in the foreign district a clearance card and filing that clearance card with the local having jurisdiction in which the work is to be done within forty-eight hours after the commencing of work and being accepted by the said local. There are other rules of said Brotherhood of Painters, Decorators and Paper Hangers of America as well as all the other labor organizations heretofore referred to which provide that in case of violation by any one of their members of any order of the said labor organization represented by their business managers or other representatives, fines may be imposed upon said members, and in case of continued

violation they may be expelled from the union, and because of the condition of the industry in the district aforesaid, the workman will be deprived of any opportunity to make a livelihood at his trade. The result of these rules and regulations is that if in violation of the orders of any one of the business agents of a union a workman shall work for a contract, he will be fined; and if he continues to work will be expelled from the union and thereby be deprived of his opportunity to make a livelihood at his trade, and the other union employees of said contractor will be called out, and if the contractor proceeds with the work with non-union employees or with union employees working in violation of the orders of the business agent, a sympathetic strike will be ordered by the union having jurisdiction of any other workmen working on said job for said contractors and the said workmen so working for other contractors, although they may be perfectly satisfied with their wages, hours, and working conditions, and although there may be no difficulty with the other contractors, will be obliged to cease from working because of the fear of fines and expulsions and the entire job will be stopped, and if this is not effective then the same kind of sympathetic strikes will be called upon other work upon which the contractor involved may be engaged.

7. There are different union conditions with respect to wages, hours and working conditions prevailing in different parts of the district aforesaid. The scale for the City of New York is ten dollars and fifty cents a day for eight hours work, five days a week. The scale for the City of Newark is ten dollars a day for eight hours work, five and a half days a week. The scale for Detroit is eight dollars a day for eight hours work and five and a half days a week. The scale for Washington is nine dollars a day for eight hours work,

five and a half days a week. The scale for Somerville is eight dollars a day for eight hours work, five and a half days a week.

8. These wages, hours, and working conditions are determined by the union and are based in part upon differences in local conditions, including the cost of living, and so forth. The difference in local conditions, of course, go into the determination of the amount which persons engaged in building operations are willing to pay for building work.

7. About the month of January, 1922, at a convention of the International Painters and Paper Hangers, held at Dallas, Texas, the convention passed a rule that where a contractor took work away from his home town, he should pay the rate of wages and observe the union conditions prevailing in his home town, if that rate of wages or working conditions were more favorable to the workman than the union scale prevailing in the district in which the work was to be done, otherwise he should pay the union scale and observe the union conditions prevailing in the place in which the work was to be done.

8. Complainant says that said rule is illegal and violative of the constitutional rights of employers of labor; it creates an illegal and unjust discrimination; it has the effect of making it more expensive for the person not living in the particular district to do work therein, in many instances it would result in excluding from the fields of operation in a particular district any persons not residents therein; because of the power of the said Brotherhood of Painters, Decorators and Paper Hangers of America in conjunction with the other unions heretofore referred to, it has more force and effect than would a statute of the state.

9. On the 8th day of November, 1924, plaintiff took a contract for the labor and material necessary for the completion of the painting of the Somerset Hospital, located on Rehill Avenue, Somerville, Somerset County, New Jersey, for the contract price of $7800. The contract provided that the work should be performed as required by the progress of the job. The contract of plaintiff was made with John Lowry, Inc., the general contractor upon the work. Plaintiff forthwith proceeded with the performance of the work and in the performance thereof all of the help it employed was local to the district except the foreman. It is the practice of all concerned, engaged in the business of painting, to send foremen from the home town. It paid the union scale prescribed by the district of Somerville and complied with the union conditions with respect to hours, and the number of days that work should be done during the week prescribed by the union for the territory including Somerville and continued on said work from December 7, 1924 to February 21, 1925. All of the men employed by plaintiff were satisfied with their wages, hours and working conditions. On or about the 21st of February, 1925, George W. Hoffman, who is the business agent or delegate of Local No. 734, informed plaintiff that he had been directed by Harry S. Warren, state organizer of the Brotherhood of Painters, Decorators and Paper Hangers of America to prevent work going forward unless plaintiff would pay the wage scale and observe working conditions prescribed by the union for the City of New York, that being the home town of plaintiff and stated that if plaintiff did not accede to the request the men employed by plaintiff would be directed not to work and plaintiff would not be permitted to obtain other help and the work would be stopped. Plaintiff refused to accede to the request

whereupon the said business agent or delegate directed men to cease work and they did cease work and have not worked since, and performance of the work has been completely stopped. The men employed by plaintiff were content with their wages, hours and working conditions and ceased work only because they were directed to cease work by the union officials aforesaid and because if they had not ceased work, they knew they would be fined by the union and if they persisted in their disobedience they would be expelled from the union and would thereby be deprived of earning a livelihood; that the foreman of the said plaintiff was directed to cease work although he was not a member of the local of the union in Somerville, being a member of another local of the same international organization and that although the said foreman was perfectly content with his hours, wages and working conditions, he was afraid to continue at work, for if he persisted in disobeying the orders of the union he would be expelled from the union and thereby be deprived of earning a livelihood.

10. It is impossible for plaintiff to proceed with the work with non-union labor because if non-union labor could be obtained the other building trades engaged in the construction of the building would strike and all of the work of the plaintiff throughout the entire country would be struck by orders of the said unions. There was and is no depute between the employees of plaintiff with regard to wages, hours and working conditions. The employees are content to work under the union conditions prevailing in the district of Somerville, but are afraid to do so for if they disobey the orders of the union they will be expelled from the union and will be deprived of the opportunity of earning a livelihood.

11. Since on or about the 21st day of February, 1925, plaintiff has been unable to proceed with the work. At the time work was stopped it was about 30 per cent. complete. Unless the plaintiff is permitted to proceed with its work free from interference upon the part of the defendants based upon the rule aforesaid, it will not be able to finish its work and its business will be irreparably injured. If the defendants are permitted to insist upon the enforcement of the rule plaintiffs will be prevented from obtaining contracts outside of its home and will be deprived of business of upwards of $600,000. Plaintiff has an investment in the contract for the completion of the painting in the Somerset Hospital and a profit of over $3000. Unless it is permitted to finish the work it will suffer loss of over $3000 exclusive of interest.

12. There is another rule of the said Brotherhood of Painters, Decorators and Paper Hangers of America, which provides that upon all work 50 per cent. of the employees engaged in the performance of the work shall be from the district in which the work is being done and from the locals and members of the locals of the locals having jurisdiction in said district, with which rule, plaintiff has complied.

13. This suit is of a civil nature in equity and the matter of controversy exceeds, exclusive of interest or costs, the sum or value of $3000.

14. There is a statute of the State of New Jersey entitled "An Act relative to persons combining and encouraging other persons to combine." P. L. 1883, page 36, 3 Comp. Statutes of New Jersey, p. 3051, which reads as follows:

> "That it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or

otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any persons, persons or corporation."

Plaintiff says that said statute is in conflict with P. L. 1, Article 1 of the Constitution of the State of New Jersey in that it impairs the right of acquiring, possessing and protecting property and pursuing and obtaining safety and happiness declared by the Constitution of New Jersey to be unalienable.

15. Plaintiff says that said statute is repugnant to the Fourteenth Amendment to the Constitution of the United States, which forbids a state depriving a person of property without due process of law, the effect of said statute being to permit persons to combine to deprive an employer of the right to make contracts and to continue his business without any legal justification and that the effect of said statute is to deprive plaintiff of its property without due process of law. Plaintiff says that said statute is further repugnant to the Fourteenth Amendment of the Constitution of the United States because it denies to plaintiffs and to other employers of labor an equal protection of the law illusory, segregating and classifying employers of labor. Plaintiff invokes the jurisdiction of this court upon the ground that the rights secured to them by the Fourteenth Amendment to the Constitution of the United States as aforesaid are infringed and draw in question the validity of the statute aforesaid.

16. Plaintiff further says that it is a citizen of the State of New York and that as a citizen of the State of New York it is entitled to the equal protection of the laws in the State of New Jersey and is entitled to

the privileges and immunities of a citizen of the State of New Jersey. The effect of not granting relief to the plaintiff under the conditions existing herein will be to permit an arbitrary discrimination to be made against plaintiff based solely upon the fact that it is a non-resident of the State of New Jersey; which will drive all employers not residents of the State of New Jersey, including plaintiff, out of business in the State of New Jersey. It will result in violating the rights of plaintiff under paragraph 1, section 2 of Article 4 of the Constitution of the United States, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several and the jurisdiction of this Court is invoked upon that ground.

17. As a citizen of the United States plaintiff is entitled to acquire, possess and protect property and to pursue safety and happiness, and to deny relief to plaintiff under the circumstances of this case would be to abridge his privileges and immunities as a citizen of the United States secured to him by the Fourteenth Amendment of the Constitution of the United States and the jurisdiction of this Court is invoked upon that ground.

18. Plaintiff further shows that the action of the unions is violative of the rights of persons not members of the union and also violative to the rights of owners of property secured to them by P. L. 1, Article 1 of the Constitution of New Jersey, to wit: the right of acquiring, possessing and protecting property and pursuing and obtaining happiness and is also violative of their rights secured to them by the Fourteenth Amendment to the Constitution of the United States, which forbids a state to deprive any person of property without due process of law and which forbids a

state from denying to any person within the jurisdiction the equal protection of the law and is also violative of their rights as citizens of the United States secured to them under the Constitution of the United States to acquire, possess and protect property and to pursue safety and happiness.

19. Plaintiff further says that the rule of said union is in unfair restraint of trade, inimical to public welfare and in violation of the public policy, both of the State of New Jersey and of the United States and that the combination and conspiracy is one denounced by the Act of July 2, 1890, Chapter 647, 26 Statutes at large, page 209, of the United States making illegal contracts, combinations and conspiracies in restraint of trade or commerce among the several states illegal.

20. Plaintiff further says that Section 20 of the Act of Congress of the United States of October 15, 1914, Chapter 323, entitled, "An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes" known as the Clayton Act is, if construed to prevent relief, unconstitutional, and null and void under the Constitution of the United States in that it permits plaintiff to be deprived of property without due process of law within the meaning of Article 5 of the amendments to the Constitution of the United States and in that it improperly restricts the extent of the judicial power of the Courts of the United States, which by P. L. 1, section 2 of article 3 of the Constitution of the United States extends to controversies between citizens of different states.

21. Plaintiff says that as matter of fact there is no controversy between plaintiff and its employees.

22. Plaintiff says that this case arises under the Constitution and laws of the United States and the jurisdiction of this Court is invoked upon that ground.

23. Plaintiff's injury is irreparable and plaintiff has no adequate remedy at law and therefore prays:

1. That the defendants in this suit, who are, Local No. 734, Brotherhood of Painters, Decorators and Paper Hangers of America; Brotherhood of Painters, Decorators and Paper Hangers of America; George W. Hoffman and Harry S. Warren, may answer this bill without oath and each statement therein made.

2. That the defendants, their officers, agents, servants, employees, attorneys and all other persons acting in concert or participating with them, may be enjoined and restrained:

a. From ordering, advising, encouraging, participating in, persuading, contributing money or advice, to any strike or cessation of work of any of complainant's employees upon the ground that plaintiff should in the district of New Jersey comply with union conditions prevailing in the district of New York or elsewhere than in the place in which the work is being done.

b. From entering upon the work upon which plaintiff is engaged and from approaching any employees of plaintiff for the purpose of interfering in any manner, shape or form, whatsoever between plaintiff and its employees, upon the ground that plaintiff should observe the union conditions prevailing in the City of New York or elsewhere than in the place in which the work is being done.

c. From ordering any person or persons, including members of said union, and from suggesting to any person or persons, including members of said union, that they should refrain from being employed by plaintiff, and from proceeding to, in any manner whatsoever, discipline any of the

members of said union for working for plaintiff, and from doing any act or thing whatever to restrict plaintiff or its employees from the free and unhindered control and conduct of plaintiff's business, and from doing any acts or things in an attempt to enforce the provision of the rule of said union referred to in the bill of complaint, which said rule in effect requires a foreign contractor to observe the union conditions prevailing in the place from which he comes if these union conditions are more favorable to the union than those prevailing in the place in which the work is being done, otherwise to observe the union conditions prevailing in the place in which the work is being done.

d. From ordering, commanding, directing, assisting, aiding or abetting in any manner whatsoever, any person or persons to attempt to commit or to commit any or each of the aforesaid acts.

e. From calling or suggesting sympathetic strikes and from carrying on any boycott of plaintiff.

3. That the rule of the said union mentioned in the bill of complaint may be adjudged and declared illegal and void and that all steps taken to force and put into effect said rule be adjudged and declared illegal and void.

4. That the temporary restraint as aforesaid pending the determination and order of this Court be granted to plaintiff.

MERRITT LANE,
Solicitor for and of Counsel with Complainant.

ANSWER TO BILL OF COMPLAINT.

(Filed April 15, 1925.)

The defendants answering the bill of complaint in the above cause say the defendant, Harry S. Warren, resides at Trenton, N. J.; George W. Hoffman resides at Somerville, N. J.; Local No. 734, Brotherhood of Painters, etc., maintains an office at Somerville, N. J.; and defendant Brotherhood of Painters, Decorators and Paper Hangers of America is a corporation that has its principal office at Lafayette, in the State of Indiana.

1. They admit paragraphs 1 and 2, except that part of paragraph 2 which says that the defendant Brotherhood of Painters, Decorators, and Paper Hangers of America is a voluntary organization and as to that, they say that said defendant is incorporated in accordance with the laws of the State of Indiana.

2. As to paragraph 3 they do not have sufficient knowledge or information on which to form a belief and leave plaintiff to make such proof as it may be advised.

3. As to paragraph 4, they deny that the Brotherhood of Painters, Decorators and Paper Hangers of America is an unincorporated, voluntary organization, but admit that it is made up of various districts and locals located throughout the United States. They deny the remainder of paragraph 4 of the complaint.

4. They deny paragraphs 5, 6, 7 and 8.

5. They admit the paragraph that is secondly numbered seven.

6. They deny the paragraph that is secondly numbered eight.

7. They deny paragraphs 9, 10 and 11.

8. They admit paragraph 12 and deny paragraph 13.

9. They admit the existence of the statute of the State of New Jersey referred to in paragraph 14, but deny that such statute is in conflict with P. L. 1, Article 1, of the Constitution of the State of New Jersey or any other part of said Constitution.

10. They deny paragraphs 15, 16, 17, 18, 19, 20, 21, 22 and 23, and pray that they may be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

HENRY CARLESS,
Attorney for Defendants.

REPLICATION TO ANSWER.

(Filed April 18, 1925.)

Plaintiff joins issue upon the answer ot the defendants.

MERRITT LANE,
Attorney of Defendants.

OPINION OF THE COURT
On Motion for Injunction, etc.
(Filed April 14, 1926.)

RUNYON, *District Judge:*

The complainant, Barker Painting Company, having its main office in New York City, is a corporation engaged in the painting industry, and for years has accepted and executed contracts in many localities situate throughout the eastern part of the United States.

The defendant, the Brotherhood of Painters, Decorators, and Paper Hangers of America, is a national labor union composed of workers engaged in the various branches of the painting and paper hanging industry, and, as an organization, is made up of local unions, approximately twelve hundred and fifty in number, located in all sections of the United States and Canada.

Local No. 734 is one of such local unions of the national Brotherhood and represents the organized painters and decorators of the town of Somerville, New Jersey, and vicinity. George W. Hoffman and Harry S. Warren, are, respectively, local business agent and general organizer connected with the Brotherhood.

The situation confronting the Court is the result of a contract secured by the complainant for the painting of the Somerset Hospital at Somerville, New Jersey, and in the performance of which it was engaged when its workmen, who were all union men and receiving wages at the union rate obtaining in Somerville and vicinity, were informed by local representatives of the Brotherhood that their continued work at that rate constituted a violation of the Brotherhood's rules. In consequence of the information thus imparted, the members of Local No. 734, after making demand for the rate contemplated in the rule and being refused,

withdrew from their labors and progress was brought to a halt, a situation which continued until a temporary injunction against the defendants was obtained from this Court, resulting in the resumption of work on the contract.

The present application aims to secure eventually a final and authoritative ruling as to whether or not the defendants, as a matter of public policy, are within their constitutional rights in attempting to enforce the rules which are here involved, by the imposition of penalties upon members for disobedience; to which system the members voluntarily submit themselves.

In the year 1921, at its convention held at Dallas, Texas, the Brotherhood of Painters, Decorators, and Paper Hangers proposed an amendment to its constitution which was subsequently ratified by the membership and incorporated in said constitution as Section 62.

The amendment, or rule, as it is called by the membership, reads as follows:

> "Where there is a difference between the wage scale of two cities all members employed upon a job done in one of the two cities by an employer from the other (whether sent from the city in which the employer's place of business is situated or hired in the city where the work is done) shall receive the higher of the two wage scales."

This rule was supplemented by another rule which provides that upon any job done by an outside employer at least 50 per cent. of the employees engaged on such job shall be hired from the locality in which it is being performed.

At the time the contract herein was made the prevailing scale of painters' wages in Somerville and vicinity was eight ($8.00) dollars for an eight-hour day, and in the City of New York ten and a half ($10.50)

dollars for an eight-hour day. And it was in view of the provisions of said rule above quoted, and because of the refusal of the complainant herein to pay the higher or New York rate that the workers, who were practically all local men, members of Local 734, and coming from the vicinity of Somerville, discontinued their work.

The present litigation is in all respects the counterpart of another action instituted in the Court of Chancery of New Jersey wherein the New Jersey Painting Company was complainant and the present Brotherhood, its Local No. 26 of Newark, New Jersey, and others were defendants, and which action eventually reached and was disposed of by the New Jersey Court of Errors and Appeals, the question at issue being in substance identical with the present one.

The original hearing in said case was had before Vice-Chancellor Backes, who decided that the strike in said matter was called in furtherance of an unlawful purpose, the same being in effect to "discriminate against employers in the matter of wages, based upon the illusory ground that the employer is not local to the place of work . . . in unfair restraint of trade, inimical to public welfare and in violation of public policy," further holding that "any attempt of the union to impose its will by the coercive means of strike would be an unwarranted and unlawful exercise of the power of might."

The injunction prayed for was granted by the learned Vice-Chancellor, and from his decision the defendants carried their appeal to the Court of Errors, which Court adopted an essentially different view from that of the Vice-Chancellor and, speaking through Mr. Justice Black, reversed the Chancery Court's decree.

Because of its illuminating nature, and also because it is the utterance of the Court of last resort in New Jersey, I have taken the liberty of quoting somewhat generous excerpts from this opinion, as follows:

"The meritorious question involved in this case is a controversy between an employer and organized labor. The bill of complaint filed contains a prayer for an injunction, against the defendants from ordering, advising, encouraging, participating in, persuading, contributing money or advice to any strike or cessation of work of any of complainant's employees. Also, from suggesting to any person or persons, including members of said union, that they should refrain from being employed by the complainant. The bill of complaint specifically charges that in the month of January, 1922, at a convention of the International Painters and Paper Hangers, held at Dallas, Texas, the convention passed a rule, that, where a contractor took work away from his home town, he should pay the rate of wages and observe the union conditions prevailing in his home town, if that rate of wages or working conditions were more favorable to the workman, than the union scale prevailing in the district in which the work was to be done, otherwise, he should pay the union scale and observe the union conditions prevailing in the place in which the work was to be done.

"It is further alleged, that such a rule is illegal and violative of the Constitutional right of employers of labor, in that, it creates an illegal and unjust discrimination. It has, so it alleged, the effect of making it more expensive for the person not living in the particular district to do work therein."

. . . . . .

"The decree follows closely the prayer of the bill and grants the restraint prayed for, with-

out specifically mentioning the Bamberger job. It restrains the defendants from doing any acts or things, in an attempt to enforce the provisions of the rule of the said union referred to in the bill of complaint. The grounds upon which the decree was advised by the learned Vice-Chancellor are, that such discrimination in the scale of wages is an unfair restraint of trade, inimical to the public welfare and in violation of public policy; that, the operation of such rules and regulations by the union is illegal and the strike is for an unlawful purpose. There is substantially no dispute about the facts. So, the whole problem for solution may be stated in a single sentence. Is such a rule of the defendants legal; and, if so, may it be enforced by penalties imposed upon its members for disobedience, which they submit to voluntarily, without violating the law? Thus, it will be seen, that the question involved is much narrower in its scope and quite clearly distinguished from any of the adjudged cases that we have examined or cited, involving labor disputes."

. . . . . .

"In 1883 the Legislature of New Jersey passed an Act which provides (1) 'That it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise, or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons or corporation.' *P. L. 1883, p. 36; 3 Comp. Sts. of New Jersey, p. 3051,* SEC. 128.

"The statute was referred to by this Court, in the case of *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.*, 77 N. J. Eq. 219, thus, the act of 1883 is properly to be treated as merely rendering the combination no longer indictable; in effect, as repealing the rule laid down by the Supreme Court of this State in the case of *State* v. *Donaldson,* 32

N. J. L. 151. This statement was unnecessary to the decision of that case. It was *mere dictum.* The basis, if not an exact copy of that statement was an oral deliverance by Vice-Chancellor Pitney, in he case of *Frank and Dugan* v. *Herold,* 63 N. J. Eq., 447. The statute is much broader in its scope, than the above statement or dictum would seem to indicate.

"This statute has been under consideration in the Court of Chancery in several cases; thus, by Vice-Chancellor Green in the case of *Mayer* v. *Journeymen Stonecutters Ass.,* 47 N. J. Eq., 531, where the learned Vice-Chancellor said: 'So long as they (i. e., the workers) confine themselves to peaceable means to effect these ends (i. e., the control of the work connected with their trade) they are within the letter and spirit of the law, and not subject to the interference of the courts,' *Barr* v. *Essex Trades Council,* 52 N. J. Eq. 119. This case was cited with approval by the Supreme Court of Missouri in *Lohse Patent Door Co.* v. *Fuelle,* 215 Mo. 457. This statute left still subject to the inhibition of law every other illegal combination, except these mentioned in the statute. So, in the case of *Cumberland Glass Mfg. Co.* v. *Glass Bottle Blowers Ass.,* 59 N. J. Eq. 53, Vice-Chancellor Reed said: 'By its terms (i. e., the statute) it is lawful for workmen to combine to persuade, by peaceable means, any person or persons to enter into any combination for the leaving or entering into the employment of any person or persons or corporation. The words employed by the statute cover a combination for the purpose of persuading others to combine for the purpose of entering or leaving an employment. According to the act, the means adopted must be peaceable.' *Jersey City Printing Company* v. *Cassidy,* 63 N. J. Eq. 762. *Baldwin Lumber Co.* v. *Local Bo. 560,* 91 N. J. Eq. 240."

. . . . . .

"The mere combination of action is not the element which gives an illegal character to the

act. It is the illegality of the purpose to be accomplished, or the illegal means used separately or in furtherance of the purpose, which makes the act illegal. *Lindsay & Company* v. *Montana Federation of Labor*, 37 Mont. 264, 273; 18 L. R. A. N. S. 707. *Vegelahn* v. *Guntner*, 167 Mass. 92, 98; 16 L. R. A. N. S., note p. 85.

"The rule adopted and promulgated by the defendants is not aimed at and does not apply to the complainant solely. It does not seek to establish arbitrary discriminations between one person or corporation and another. It applies to all employing painters within the whole territory of the United States, who undertake to do work outside of their home districts. It applies to all alike, automatically, who come within the prescribed rule. Co-operation in some form now seems to be an economic necessity, in all business, trades and occupations, throughout the United States, if not, throughout the entire world."

. . . . . .

"Nearly all the cases in this country quite uniformly hold, and the complainant seems to concede, that the union may arbitrarily fix a uniform scale of wage applicable to all its members and strike to enforce its demands, i. e., either to maintain or advance a scale of wages; and the strike will not be interfered with by the courts, if it is lawfully carried on. *Bossert* v. *Dhuy*, 221 N. Y. 342. But the argument by the complainant followed by the learned Vice-Chancellor in this case, seems to be based upon the idea, that the union cannot in good faith frame or adopt a rule providing for a sliding scale of wages, to fit ostensibly the varying local economic conditions throughout the United States, which in effect does discriminate against some employers, as a class, in the matter of wages to be paid. It seems to be based upon the ground that, such regulations create an unfair restraint of trade. The attack is aimed not at the combination but at its effect upon

the employer. This is unsound, both legally and economically. In the last analysis, the prime object of the rule attacked is to establish a standard of wages. It is hardly necessary to enter into any extended discussion, pointing out that in law or by analogy Article 4 sec. 2 and Article 14 sec. 1 of the Constitution of the United States, are not applicable to private contracts. These sections are directed against state action only: *United States* v. *Harris,* 106 U. S. 643. Economically, the conclusion reached by the lower court confuses the possible or probable effect of the defendant's action upon the employers with the defendant's rights. The law gives the defendants a right to sell their labor to whom they please, when and under such conditions as they may fix, individually or in combination. They may make rules and regulations passed in good faith, providing for what they deem to be an economic advantage to themselves. If in the enforcement of such rules and regulations, they violate no law, but act solely for the declared purpose, the courts ought not and cannot legally enjoin them from such concerted action, simply, because, such action may affect some employers. How can it be said that such rules and regulations create an unfair restraint of trade? If the law gives the workers such rights, it must protect them in their employment. They cannot be enjoined from their use or interfered with by the courts. Employers have no vested interest in the labor of workers. We think the defendants, by the terms of the Statute of 1883, both its letter and spirit are within its protection. They are also within the protection of the law as declared in the cases cited. The cases, in which concerted action on the part of a body of workers has been held unlawful, have invariably been such, in which either the object sought to be attained had little or no bearing on the interest of the workers or in which the methods employed by them were in themselves unlawful."

In reviewing this opinion, counsel for the petitioner in the instant case contends that the combination itself constitutes the offense complained of; that while each individual member of the union, if acting alone, had and has an indisputable right to stop work, and all because his employer, coming from a higher jurisdiction wherein higher wages are paid, refuses to pay him that higher rate, yet the concerted action of the same individuals, seeking the same advantage for the same cause, and producing the same effect, constitutes, of itself, an offense, in that such combination takes the situation out of the domain of the privilege which is each man's inalienable right, and into the domain of relative rights wherein the employer, the workers, and the public are parties.

If the entire transaction, as instituted by each individual member and carried to the point of actual cessation of work, is neither inherently bad nor constitutes an offense; if such transaction, duplicated a hundred times by that number of individuals, constitutes no such offense, it follows that the offense herein —if any there be—lies neither in the ultimatum of the individual worker, nor in his withdrawal from his work, nor in the hundred other duplications of such procedure; nor in having, through such means, brought the employer's business to a standstill—a disastrous standstill, perhaps—but must arise from the fact that these individuals have not acted, each for himself, but collectively, and as members of an organization.

And even so, the trend of modern economic usage, both as practiced and as given expression in the courts, is increasingly against regarding combinations among laborers as unlawful *per se,* but narrows its condemnation to those combinations which are formed for the purpose of effecting an unlawful object, or the doing

of a distinct injury to one against whom the activities of the combination may be directed.

> "Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant."
>
> Gompers v. Bucks Stove and Range Co., 221 U. S. p. 437.

Assuming, therefore, that a combination is not unlawful, *per se*, inquiry must be directed to the ascertainment of the objects of the present combination, and the mode and method adopted in putting such objects into practice, whether or not they be lawful; and also to the effect thereby produced.

There are divers objects sought in the organization of labor; the betterment of general working conditions, the adoption of proper safety appliances, workmen's compensation in cases of injury and death, hours of labor, etc., etc. And by no means the least of these objects is that one which deals with wages.

A reading of the rule adopted at Dallas furnishes ample proof that, in the minds of those who framed its terms, there was one main plan—that of increasing wages under certain conditions therein named. Whatever dispute there may be regarding these conditions, the fact must remain that there was in contemplation their utilization as a basis for wage increase.

By itself, the quest for increased wages is a lawful object; and, therefore, if in the present case, in connection with the object of securing increased wages there appears that which is unlawful, it is to be found in one or more of the following factors: either in the residential feature of the rule, or in the methods adopted in the attainment of the object, or in the effect which such attainment has produced.

The record herein is barren of any showing of intimidation, violence, or disorder of any sort on the part of those who ceased work, or of those representatives of the unions at whose instance the demand for higher wages was made, and so this feature may safely be eliminated as in no wise having contributed to possible illegality.

With reference to the residential feature of the rule here involved, it has been urged in the dissenting opinion in the New Jersey Court of Errors and Appeals that an unlawful discrimination was thereby enforced because not founded upon any subject properly germane to the difference in wage scales involved, and that such discrimination is violation of the Constitutional right of every citizen to enjoy all privileges and immunities of citizens in the several states.

Had the rule in question drawn a specific line of demarcation, basing its operation avowedly upon differences in State citizenship, I can conceive that such differentiation would constitute an unlawful and forbidden discrimination, but as I read the rule, it is not subject to that interpretation, concerning itself in no wise with state lines, but applying to anybody and everybody who essays to do business outside of his home city, whether it be in a neighboring town in his own state, or in some distant foreign jurisdiction.

In other words, this rule applies with equal force and effect to everybody, regardless of state residence, who is similarly situated and, in such application, I take it, frees itself of the charge of effecting an unlawful discrimination.

And while there may be wide differences of opinion regarding the logic involved in, or the soundness of, a rule wherein the home city of a contractor enters as a factor in the fixing of the wage scale, provided he is doing business in a locality where the rate of wages

is less than in his home city, yet, even so, it can hardly be urged as a general proposition that the matter of residence is not one germane to the question of wages, since it is, in a real sense and under all ordinary conditions, the controlling factor. A contractor, living and doing business in a small town, pays his workers the union wage scale established for that town. Eventually, and of his own accord, moving his business and establishing it in a large city, he accepts the altered conditions and pays the identical staff of workers the enlarged rate of the metropolis, for with the change of his "home city" has come the consequent change in the stipend of his workers. Therefore, I believe the basis of the rule here involved is not at all artificial, as may at first have appeared, but has both reason and custom to support it and comes within the rules laid down in the following: Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without such basis."

Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U. S. 155.

"While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis."

Southern Ry. Co. v. Greene, 216 U. S. 417.

The natural effect of all of the foregoing is to equalize, at the higher rate, the wages of all workers employed under the conditions set out in the rule under

review, and thus, as it appears to me, the object and effect of the rule are lawful, as are also the foundation laid and the means relied on for its enforcement.

The case of Truax v. Corrigan, 257 U. S., p. 312, is strongly urged in support of the alleged illegality of the rule, both as to its provisions and its operation, but as I read that case, it is far removed from the instant one.

In that case the distinct object of the concerted action was to injure the plaintiff's business in order that he might be forced to meet the defendant's demands, and the means adopted to cause that loss were little short of scandalous, consisting in part, as they did, of virulent attacks upon the character, not only of the plaintiff and his business, but also of those who patronized the plaintiff. The effect of this destructive campaign was ruinous to the plaintiff's business, and the Supreme Court holds that a state statute which in practice denies legal relief in all forms, or, at the least, equitable or injunctive relief, under such circumstances, is defective, in that it fails to afford all the equal protection of the laws. The inequality in the operation of the statute was based upon the fact that it favored plaintiff's ex-employes—parties whose relationship with plaintiff had in reality ceased—in exempting them as parties to a labor dispute from the operation of a law made applicable to all others who might seek to destroy plaintiff's business and property, and in so doing, proceed exactly as these ex-employes did.

And while the actual facts and circumstances of this Truax case remove it far from those of the case under consideration, making it, apparently, much more susceptible to attack from a conspiracy standpoint, it is significant of the strong tendency to uphold concerted action in labor disputes, that dissenting opinions were filed by three members of the Court, Justices

Holmes, Pitney and Brandeis, Mr. Justice Clarke concurring in the opinion of Mr. Justice Pitney, and all to the effect that the Arizona judgment should have been affirmed.

Because of the foregoing, and because the New Jersey Court of Errors and Appeals in the kindred case of New Jersey Painting Company v. Local No. 26, above referred to, in applying the statute of 1883 (P. L. 1883, p. 36, 3 Comp. Stats. of New Jersey, p. 3051, Sec. 128) to the circumstances of that case, approves it as warranting the cessation of work on the part of the employes there concerned, I am of the opinion that in this case the defendants have acted altogether within their legal rights, and that the injunctive restraint heretofore granted should be dissolved.

FINAL DECREE AND EXCEPTIONS THERETO.

(Filed March 23, 1928.)

The above entitled cause coming on to be heard before the court in the presence of Merritt Lane, of counsel, with the complainants and Henry Carless, of counsel, with the defendants and the proofs offered by the respective parties having been taken in open court and the court having considered the pleadings, proofs and argument of counsel and being of the opinion that the complainant is not entitled to the relief sought in its bill of complaint;

It is on this seventh day of March, 1928, ORDERED, ADJUDGED and DECREED that the complainant's bill be and the same is hereby dismissed with costs.

WM. N. RUNYON,
J.

An exception to the decree is prayed by the complainant and it is allowed and signed and sealed accordingly.

WM. N. RUNYON,
Judge. (L. S.)

PETITION OF APPEAL AND NOTICE OF APPEAL.

(Filed June 4, 1928.)

To the Honorable the Judges of the United States District Court, for the District of New Jersey:

Barker Painting Company, the above named complainant in the above entitled cause, feeling itself aggrieved by a final decree made and entered by the above named court, in the above entitled cause, under date of March 7, 1928, wherein and whereby, among other things, it was and is ordered and directed that the bill of complaint of the complainant be dismissed with costs to the defendants, does hereby appeal to the United States Circuit Court of Appeals, for the Third District, from such decree and from every part thereof for the reason that under the law and the facts the United States District Court, for the District of New Jersey, should have granted the relief prayed for by complainant, and it prays that this appeal may be allowed and that a transcript of the record, papers and proceedings upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit, and that a decree may be made granting the relief prayed for by the complainant in the bill of complaint.

MERRITT LANE,
Solicitor for and of counsel with Complainant.

ORDER ALLOWING APPEAL.

(Filed June 4, 1928.)

On motion of Merritt Lane, solicitor for and of counsel with complainant:

It is on this fourteenth day of June, 1928, ORDERED an appeal to the United States Circuit Court of Appeals, for the Third Circuit, from a final decree heretofore filed and entered herein be and the same is hereby allowed and that a copy of the record, testimony, exhibits, etc., and all proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals, for the Third Circuit.

And it is ordered that the bond on appeal be fixed at the sum of $300.00.

WILLIAM L. CLARK,
Judge, U. S. District Court.

An undertaking on appeal in the sum of $300.00, as required by the order allowing appeal, which said undertaking or bond was approved by the Hon. William N. Runyon and ordered filed.

Citation on appeal, directed to all of the defendants, requiring them to appear in the United States Circuit Court of Appeals for the Third Circuit within thirty days from the fourth day of June, 1928, the service of which citation was duly acknowledged by the attorney for all of the defendants upon the fourth day of June, 1928, and which citation was returned and filed upon the fourth day of June, 1928.

Extensions of time signed by the District Judge, extending for ninety days each the term "within which

the complainant may take an appeal and within which to settle and sign the bill of exceptions and to file assignment of errors, and for all other purposes of the above mentioned cause, original or appellate," the last of which said extensions expires upon the twentieth day of May, 1929, each of which said extensions was duly signed and filed prior to the expiration of the term.

ASSIGNMENT OF ERRORS.

(Filed March 12, 1929.)

The United States District Court for the District of New Jersey, which entered the decree of dismissal of plaintiff's bill, erred as follows:

1. In dismissing the bill of complaint with costs.

2. In refusing to grant an injunction against the defendants in accordance with the second prayer of the bill of complaint.

3. In declining to adjudicate that the rule of the unions mentioned in the bill of complaint is illegal and void, and that all steps taken to enforce and put into effect said rule are illegal and void.

4. In holding that the rule referred to in the bill of complaint had as an object increase of wages and the adoption and enforcement of such rule was within the legal right of defendants.

5. In refusing to hold that said rule and the attempt to enforce it was illegal, and to attempt to enforce it against plaintiff under the circumstances proven in the case was illegal, and its enforcement by the conduct of the defendants as shown in the evi-

dence constituted a deprivation of plaintiff's property without due process of law and a denial to it of the equal protection of the law, violating the provisions of the guarantees of the Constitution of the United States in the particulars and respects stated.

6. In refusing to hold that the said rule and the efforts to enforce it, as shown by the evidence, as against plaintiff are unlawful as creating monopolies; and illegal, unjust, oppressive, discriminatory, inimicable to public welfare, violative of public policy and in unfair restraint of trade and constitute an unlawful combination, and that the defendants engaged in enforcing said rule as against plaintiff are guilty of an unlawful combination and conspiracy directed particularly and especially against the plaintiff, causing it irreparable injury, loss and damage and deprive plaintiff of the contract rights referred to in the bill of complaint, and would utterly and completely destroy the business of plaintiff outside of the City of New York.

7. In refusing to hold that the action of the defendants, set forth in the evidence, is violative of the rights of owners of property, including plaintiff, secured to them by P. L. 1, Article 1 of the Constitution of the State of New Jersey, to wit: "the right of acquiring, possessing and protecting property and pursuing and obtaining happiness," and is also violative of their rights as citizens of the United States secured to them under the Constitution of the United States, "to secure, possess and protect property and to pursue safety and happiness."

8. In refusing to hold that the rule and the efforts to enforce it were in unfair restraint of trade, inimicable to public welfare and a combination and conspir-

acy denounced by the Act of July 2, 1890, Chapter 647, 26 Statutes at large, page 209, of the United States, making illegal contracts, combinations and conspiracies in restraint of trade or commerce among the several states and its supplements and amendments.

9. In refusing to hold that the conduct of the defendants was not within the protection of Section 20 of an Act of Congress of the United States of October 15, 1914, Chapter 323, entitled "An Act supplementing existing laws against unlawful restraint and monopolies and for other purposes," known as the Clayton Act.

10. In refusing to hold that if the conduct of the unions be within the provisions of said section last above referred to, then said section is unconstitutional and null and void under the Constitution of the United States in that it permits plaintiff to be deprived of property without due process of law within the meaning of Article 5 of the amendments to the Constitution of the United States and in that it improperly restricts the extent of the judicial power of the Courts of the United States, which by P. L. 1, Section 2 of Article 3 of the Constitution of the United States, extends to controversies between citizens of different states.

11. In refusing to hold that the conduct of the said defendants, as shown by the evidence, is not within the protection of a statute of the State of New Jersey entitled "An Act relative to persons combining and encouraging other persons to combine," P. L. 1883, p. 36, 3 Comp. Stat. of N. J., p. 3051.

12. In refusing to hold that, if the conduct of the said defendants, as shown by the evidence in this case, be within the protection of the act last above mentioned, then that such statute is in conflict with P. L. 1, Article

1, of the Constitution of the State of New Jersey, in that it impairs the right of acquiring, possessing and protecting property and of pursuing and obtaining safety and happiness, declared by the Constitution of New Jersey to be inalienable.

13. In refusing to hold that, if the conduct of the said defendants, as shown by the evidence, is within the protection of said statute last above referred to, then that such statute is unconstitutional, as repugnant to the Fourteenth Amendment to the Constitution of the United States which forbids a State depriving a person of property without due process of law, the effect of said statute being to permit persons to combine to deprive an employer of the right to make contracts and to continue his business, without any legal justification and that the effect of said statute is to deprive plaintiff of its property without due process of law.

14. In refusing to hold that if the conduct of the defendants, as shown by the evidence, be within the protection of said statute then that said statute is unconstitutional, as repugnant to the Fourteenth Amendment to the Constitution of the United States because it denies to plaintiff and to other employers of labor the equal protection of the law.

15. In refusing to hold that the effect of not granting relief to the plaintiff under the condition shown by the evidence would be to permit arbitrary discrimination to be made against plaintiff based solely upon the fact that it is a non-resident of the State of New Jersey, and would result in violating the rights of plaintiff under paragraph 1, section 2 of Article 4 of the Constitution of the United States, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.

16. In holding that the record was barren of any showing of intimidation on the part of defendants and that the means adopted by the defendants to enforce said rule were lawful.

17. In refusing to hold that the means adopted by the defendants to enforce the rule were intimidative and unlawful.

18. In refusing to hold that the rule referred to in the bill of complaint is not founded upon any subject properly germane to the wage scale or the difference in wage scale and that the discrimination against the plaintiff is an illegal boycott and unlawful.

19. In overruling the offer of Defendants' Exhibit P-3 for identification.

(Sgd.) MERRITT LANE,
Attorney for Plaintiff.

STATEMENT OF EVIDENCE, APPROVED AND SIGNED.
(Filed March 12, 1929.)

IN THE UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF NEW JERSEY.

No. 1160. IN EQUITY.

BARKER PAINTING CO.,
Plaintiff,

v.

LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA, ET ALS.,
Defendants.

BE IT REMEMBERED, that the above-entitled cause duly came on for hearing before the HONORABLE WILLIAM N. RUNYON, Judge of the United States District Court, sitting in equity on the eighth day of May, 1925, MERRITT LANE, Esquire, appearing for the complainant, and HENRY CARLESS, Esquire, appearing for the defendant, and thereon the following occurred. The plaintiff to maintain the issue upon its part joined, offered evidence as follows:

PLAINTIFF'S EVIDENCE.

By ARTHUR J. ROSENTHAL: That he is the president of the plaintiff company and has been a contracting painter and decorator for fourteen years; that plaintiff is a corporation organized under the laws of the State of New York, with its offices at 225 East Forty-fourth Street, New York City, and, in the last

two or three years, it has performed work outside of the State of New York, including the Mayflower Hotel, Washington, D. C.; the Syracuse Hotel, Syracuse, New York; the Niagara Hotel, Niagara Falls, New York; the Penn Harris Addition, Harrisburg, Pennsylvania, and more than fifty others, its business extending over the entire United States from New York to Winnipeg, New Orleans to New York, to Dallas, and New Orleans to Winnipeg; that the witness personally, in the past fourteen years, has been interested in several thousand contracts for painting and decorating, in amount from four and five hundred dollars to one hundred and fifty thousand dollars, and over the territory above named; that he himself puts the price on most of the jobs and is fully familiar with the painting business generally that it is of a highly competitive nature; that he has discussed with others the matter of estimating on the jobs, and over objection and exception of the defendants, the witness then said that painting and decorating contractors, in estimating on the jobs, did not figure on the price of labor at the rate prevailing in the territory of the contractor's residence, but figured on the prevailing rate at the place where the work was to be performed; that in the case of plaintiff if on its outside work, that is work outside of the territory of New York, it figured on the rate prevailing in the territory of New York, the place of residence of plaintiff, it could not get the job because the local contractor would always get it, and competition would be destroyed; that 65 per cent. of the contract price on a job of painting and decorating is the cost of labor; the witness gave as an illustration as to what it meant to be compelled to pay the rate prevailing at the place of the residence of plaintiff, a job which it had for the painting and decorating of the Hotel Statler, in Buffalo, and, over objection and exception, the witness was permitted to say that the job represented over $100,000 and that it completed the job

itself with union labor at the rate prevailing in Buffalo, and that if it had been compelled to pay the rate for labor prevailing in the territory of New York of which plaintiff was a resident, it would have made a difference of from fifteen to eighteen thousand dollars; that the witness is fully familiar with the extent of the unionization of the painting industry throughout the United States; that he is obliged to be familiar with that situation and has been for years, in order that he may conduct the business of plaintiff and make estimates on jobs, and that he is the vice-president of the Employers Association of New York City, that is, the National Association, and in that capacity is acquainted with the trades in all lines pretty well throughout the country; that on all building trades on new work throughout the United States, the painting and decorating industry is practically 100 per cent. unionized and likewise in New Jersey; likewise in Connecticut; likewise in Pennsylvania, and that it has been so unionized for the past eight or nine years; that it is impossible for plaintiff to perform any painting and decorating work either in New York, Pennsylvania, Connecticut or New Jersey without union labor; that all building trades on all new work throughout the United States, with the exception of spots like San Francisco, Chicago and Philadelphia, are practically 100 per cent. union and that that applies to the States of New Jersey, Pennsylvania, Connecticut and New York; that in New Jersey all of the building trades are 100 per cent. union; that in New York they are gathered together in two building trades council, one council comprising twenty-six trades and another council five trades; all affiliated with the American Federation of Labor; that union members of one trade will not work upon a building where non-union members are employed in another trade; that if it were possible for plaintiff to obtain non-union men to work under present conditions upon any building in New York or New Jer-

sey plaintiff could not do so because on all jobs which it had scattered throughout the country the painters would refuse to work for plaintiff because it employed non-union men, the position of the union being that a man cannot be fair in one town and unfair in another; that if plaintiff should employ non-union men on the Somerset Hospital in New Jersey, although it was employing all union men on the other jobs it had throughout the country, those jobs would be stopped; that if it employed non-union men on the Somerset Hospital, the other trades employed on the Hospital would refuse to work and the building would be stopped; that the rate of union wages prevailing in New York, the residence of plaintiff, is $10.50 for eight-hour day; in Washington nine dollars per day for eight-hour day; in Buffalo (answered over objection of counsel) eight dollars a day; in Somerville, New Jersey, on the eighth day of November, 1924, the rate was eight dollars a day; that rate has been changed and the witness thinks it is now nine dollars a day, but it is, in any event, under the New York rate; about the eighth day of November, 1924, plaintiff made a contract for painting and decorating the Somerset Hospital, in Somerville, New Jersey, and the contract was offered in evidence and marked "Exhibit P-1"; that in pursuance of that contract, work was commenced late in January, starting with a couple of men and running up to about six; that all of the men employed were union men and eight dollars a day was paid, which was the rate prevailing in Somerville, New Jersey; that the work progressed for several weeks and the men then demanded pay at the New York rate, and upon plaintiff's refusal to accede to the request, they quit the job; the work was about 30 per cent. complete; and its condition was such as that it was necessary that it be forthwith prosecuted so as not to interfere with the completion of the building; that at the time the demand for the New York rate

was made it was stated that it was because of the rule of the International Association passed at the convention held in Dallas, Texas, making it the right of the union to demand the higher wage where the employer goes out of town—a higher wage than the local rate when the employer comes from a place where a higher wage is paid; that the men employed on the hospital at Somerville, New Jersey, were, with the exception of the foreman, all local to Somerville; that upon the men quitting, the work was stopped until a temporary injunction was granted by the Court in this proceeding; that in making the estimate for the work at the Somerset Hospital, in Somerville, the plaintiff figured as it always had upon the wage prevailing at the local point, in that instance in Somerville; that during the year prior to the filing of the bill plaintiff had done approximately one million two hundred thousand dollars of work, and that its outstanding contracts at the time the men ceased working on the Somerset Hospital were in the neighborhood of several hundred thousand dollars: asked as to whether the foreman, whose name was Lemmer, was content to go on with the work, upon objection of defendant, the witness was not permitted to answer.

On *cross-examination* the witness said that there were a great many agreements in the different lines of the building trades industry providing that the men should refuse to work with non-union men and that they were just closing an agreement with the New York Painters Union in which that clause was included; that plaintiff had agreements with the Painters Union to employ exclusively union men; that the agreements necessarily implied that all union men would be working under union conditions; that such an agreement was in existence at the time it made its bid for the work on the Somerset Hospital, and that

plaintiff knew of the change in the constitution of the United Brotherhood of Painters, Decorators and Paper Hangers which provided that plaintiff's concern coming from New York, where the wage scale was higher, would have to pay the higher rate, but plaintiff denied the right of the union to make and enforce such rule; the witness knew of the decision of the Court of Errors and Appeals of the State of New Jersey deciding that the rule relating to the higher wages was a legal rule, that decision having been made in May, 1924, and the estimates on the Somerset Hospital having been made in November, 1924; that on work at the Westinghouse Company plant in Kearny, New Jersey, plaintiff paid $10.50 a day, which was the prevailing rate in New York, whereas the rate in Kearny was ten dollars a day; that the men worked five days a week; that on the Kearny job half of the men came from Newark and half from New York; that on the Firemens Building in Newark plaintiff paid $10.50 a day for five days a week, eight hours a day; that the witness does not know that the plumbers union in the City of Newark does not belong to the Building Trades Council but knows that generally the plumbers union do belong to the Building Trades Council wherever they exist, and knows that in Newark the trades generally belong to the Council, and that if the plumbers union does not it would be contrary to the general rule; that he does not know that the roofers union in the City of Newark has not belonged to the Building Trades Council for years, but does know that the 7000 carpenters in the City of Newark and Essex County have not been affiliated with the Building Trades Council for the last few months; that although there are two Building Trades Councils in New York unofficially they are—"just as though it was one council," and they work together. The witness does not know that

the respective unions are under no obligation by any rule of the American Federation of Labor or of any other labor organization to quit work in case of a dispute between any one of the—although probably there is no such rule; that this fact does not change the witness' testimony that it would be impossible to get other men to work because each union has its own rule that it will not work with non-union men in any trade; that generally if non-union conditions prevail in any one trade, the other trades will not work with non-union men; that the witness can cite many instances of sympathetic strikes in aid of the painters; that when work was started on the Somerset Hospital by plaintiff all building trades were working on the building, including the bricklayer and the plasterer, the bricklayers putting up partition work in the basement, finishing up inside, the electricians wiring, pulling wires, putting in the fixtures, carpenters "all of them were there, tile men, plumbers—" they were practically all still on the building; that when the painters quit, the other trades did not quit; that they would not quit unless plaintiff tried to man the job with non-union men, "Then they would have quit out of sympathy"; that up to the time plaintiff's employees quit on the job, no one had said anything to witness about the other trades quitting, and the following then occurred:

Q. Well, what made you think they would?

A. Well, we knew it; I have been in this game for thirty-five years and know that if we have been on a building where a strike occurs and the job was manned with non-union men, that the trades generally would walk off the building. They don't have to tell us.

Q. It isn't always so, is it?

A. Oh, you will find exceptional cases. In New York City, for instance, the agreement which we have with the old council states that in case a union breaks

its agreement, no support shall be given to union men and a union which has gone on a strike in violation of the agreement shall not be supported by the others striking in sympathy. Now, that happens around the country, in the larger cities especially.

Q. That is what they call an outlaw strike?

A. That would be an outlaw strike, yes, sir.

The witness then proceeded to testify that plaintiff did not estimate on the New York scale for outside work and that if it did "it might just as well quit business;" that plaintiff did not figure on the Westinghouse job at Kearny and the Firemens Building in Newark on the New York scale, but the scale in Kearny and Newark being within fifty cents of the New York scale, it preferred to pay the higher scale, a little more than the local scale, because the local boss hires the men the year round and plaintiff comes in but occasionally and that it was not to be expected that the men would quit a .egular job to go to work for plaintiff unless there was something in it, and plaintiff was always ready to pay five cents an hour more than the local rate, and, in some instances, to obtain labor had paid ten cents an hour more; that plaintiff paid five cents an hour more or fifty cents a day "because we can get the better men in the town and the better men is worth that and more too"; that occasionally it is necessary for plaintiff to give more inducement to get the local men to work, but that it is very seldom that it cannot get local men to man the job; that occasionally because of the shortage of labor at the local point plaintiff sent New York men to man the job, in which event it paid the board of the men and transportation, as is the usual custom, but that plaintiff does not figure in estimating on a job on the possibility of not getting local men and "A. If we find a condition occasionally where we are penalized that much, we lose it."

By ARTHUR P. DEMARAY, on *direct examination by Mr. Lane,* he lives at Somerville, New Jersey, and is a painter and member of the Brotherhood of Painters, Decorators and Paper Hangers of America, Local No. 734, having been such about a year; he was engaged by the Barker Painting Company to work on the Somerset Hospital and started work in the latter part of November, as well as he can recall and quit around the 11th or 12th of February on the order of the local representative of the union, George W. Hoffman. The following then occurred:

Q. And why did he order you to quit work, did he say?

A. No, I can't say that he did, Mr. Lane.

Q. Did you ask him?

A. Well, I don't know as I asked him personally. I heard some rumors going about among us few men that we were taken off the job on the account of we were working for local wages and should have New York City wages.

The witness continued that: he wanted to work and quit only because "we were taken off." He obeyed the orders of Mr. Hoffman to quit "as he is our representative out there, and as I understand it we are to do as he says"; he cannot say whether he would be fined or expelled if he did not quit; he was content with his wages, hours and working conditions, and had been working for twelve weeks; and the only reason why he quit was that Hoffman told him to; he did not go back to work for complainant.

On *cross-examination by Mr. Carless* the witness said that: he had been a painter about thirty years and had lived all his life in Somerville and vicinity; he had worked thirty years as a painter before he joined the union; he did not know anything about the rules of the United Brotherhood relating to the rate

of wages that should be paid except that the rate in Somerville was $8 on the first of April, 1925; he did not know before he joined, and did not learn that, according to the rules of the United Brotherhood of Painters and Paper Hangers, local men working in Somerset should receive ten dollars and a half a day if the contractor was from New York until "we were taken off the job"; before he was taken off the job, he and the other painters had not been talking the matter over and no one had spoken to him about it; he started in first with the foreman, Mr. Lemmer, and worked for probably six weeks along with him, just the two; there were three other men added about six weeks after he started toward the end of January, from which time until the time of this trouble there were five men working; the men did not talk about and did not hear about any report that they were not receiving the rate of wages they should receive, according to the rules; he never heard a word about it until the day he was taken off the job, from any source whatever; he attended every meeting of the union but never heard anything about it and never heard any communication read about it; Hoffman was at the hospital and around a little time before he ordered the painters off; he had not talked with Hoffman about the rate of wages; Lemmer, the foreman, the witness and the painters, Winsor, Demaray and Housh were working there together. The following then occurred:

Q. What did Hoffman say?

A. Well, the best I can recall, he said that, "You fellows can't continue here; you will have to let today be your last." I think that was about twelve o'clock, eleven o'clock in the morning.

He continued that: these were Hoffman's first words. The following then occurred:

Q. Yes. He told you that the local union had decided that the rules would have to be lived up to.

A. He stated that was why he was taking us off.

Q. Well, he didn't tell you to quit work; he told you about the rules, that the local union had decided that the rules should be enforced.

A. He told us to quit work.

Q. Well, what was his language?

A. In a gentlemanly way, he said, "Men, I have got to take you off this job; today must be your last," and stated why.

Q. Well, when you say he stated why, why did he say?

A. He said that, "The New York contractors are supposed by law to pay you New York wages, and you can't work unless they do."

Q. That is, he said if you didn't—didn't he say if you continued working you would be violating the union rules and he was notifying you of that?

A. Well, I can't recall that he said those words.

Q. And that if you continued working after today you will be doing so in violation of the rules?

A. He might have said that.

Q. Yes. You could have continued if you wanted to, couldn't you?

A. I couldn't answer that question.

The witness continued that: had he known that under the rules of the painters' union he should have received ten dollars and a half a day, he did not know whether he would have been satisfied to work for eight, "if that was the law" if he had known that under the rules of the union that he had joined, he should have received ten and a half a day on that job and work only five days a week, he would have wanted to work five days and get the ten and a half a day.

On *re-direct examination* the witness said he would like to get as much as he could; he had been with the Johns-Manville Company for many years and was tired of the factory work and one of his friends in the

painters' union said, "Why, if you are going to quit Manville, why don't you join the union?" and he said, "I will," and that is why he joined the union; the work at Johns-Manville was inside factory work and it was not a union plant; in that class of work the employees are not members of the union and he had remained a non-union man while he was doing that class of work for some twelve years; he wanted to get away from factory life and get work in the open; there was no necessity, but he wouldn't go around and undercut, wouldn't do it for anybody, himself or anybody else. The following then occurred:

Q. I am not talking about undercutting. You could have remained a non-union man and still not undercut, couldn't you?

A. Well, you might in some places, but I don't think you could do very much out there.

By THOMAS WINSOR: On *direct examination* that: He is a painter living in Somerville and had been a member of the local about a year and six months and a union man about two years and six months; he was one of the men who were employed by complainant on the hospital job and worked on it until about the 20th of February, when Hoffman took them off the job; Hoffman is their business agent although not a member of the local; he is a member of the carpenters' union and represents both the carpenters and the painters; Warren is State organizer for the painters; witness refrained from work after being taken off by Hoffman for about eight weeks and then went back to work when the injunction in this suit was granted at the same wage that had been paid before he quit and continued to work at the local rate.

On *cross-examination* the witness said that: He regularly attended the meetings of Local 734; that he did not hear any communication read from the District Council of Painters from the New Jersey Council of Painters, about the rule relating to the payment of higher wages; that he heard some talk among the "general run of fellows that are up there" about the Barker Company not living up to "ten dollars and fifty cents a day"; he did not know before the strike occurred that, according to the union rules, ten dollars and a half a day should be paid on the job; all he heard was they should get ten dollars and fifty cents a day; he does not know why they said it, the information come from Bound Brook; "some of the painters in Bound Brook had said that on that job the men who were working should get ten and a half a day"; he thinks they also said that they should work only five days a week; he did not know that that was one of the rules of the union; he had been working about two weeks before the strike was called; and the following then occurred:

Q. Well, I suppose if you had known that the rules of your union provided for ten and a half a day on that job you would have wanted it, wouldn't you?

Yes.

He continued that: Hoffman was on the job about three times before the strike; he finally told the witness that, according to the rules of the Brotherhood of Painters, Decorators and Paper Hangers he should get ten and a half a day and if the witness continued working he would be working in violation of the union rules; Hoffman did not threaten to fine or expel or do anything to him. The following then occurred:

Q. Then, when you knew that it was in violation of the rules, then you were satisfied to quit?

A. Yes.

Q. And you did quit?

A. Yes.

Q. Because you thought if you continued working you would be doing so in violation of your union rules?

A. Mr. Hoffman told us, yes.

Q. Yes. And that was what you——

A. Yes, yes.

On *re-direct examination* the witness testified that: He went back to work after the injunction of the Court because "I couldn't find anybody to tell me not to go back to work." The following then occurred:

Q. So, not finding anybody to tell you not to go back to work, you went to work?

A. Yes.

Q. And finding somebody to tell you to quit, you quit, originally?

A. Yes.

On *re-cross-examination* the following occurred:

Q. Did you know, do you know now, while you are working there, you are violating the rules of the union?

A. I don't know it.

Q. Do you still belong to the union?

A. I belong to the union, yes.

Q. Do you go to the meetings?

A. Yes.

Q. Do you expect to continue a member?

A. Do I expect to continue?

Q. Yes; do you expect to continue as a member of the organization?

A. Yes, yes.

Q. Would you expect to continue as a member of any other organization if you knew you were violating the rules of the organization?

A. I don't know that I am violating the rules of the organization.

Q. Well, you have been told, haven't you, that you are?

A. Before the injunction was served, yes.

Q. Yes; you have been told since then, too, haven't you?

A. No.

Q. Well, you don't want these men to get in contempt of Court, come down again and tell you that you are violating the rules, do you?

A. I don't want them to say anything, but I would like to get a little satisfaction.

Q. Well, you know, don't you——

MR. LANE: I do submit that this examination is coming pretty close to directions to this witness on the stand, who is still employed by us, almost in violation of your Honor's injunction.

MR. CARLESS: Well, if your Honor please, I am not going to be in contempt——

THE COURT: I think it is a line that is susceptible to two very different interpretations and I was just wondering myself what the slant was.

MR. CARLESS: Well, the witness says that the reason he didn't quit was because nobody came and told him to quit. Now, I am asking him whether he didn't know and doesn't know now that he is violating the rules of his organization.

Q. You say you don't?

A. From what I can find out, no.

Q. So you don't consider you are violating the rules of any organization——

A. No.

Q. —unless someone comes and tells you?

A. That is it.

The witness then testified that: When Hoffman came on the job, he did not tell the witness that he was

violating the rules; Hoffman said that there was no rule about it; he said they were out to get ten dollars and fifty cents a day.

By JOSEPH HOUSH, on *direct examination:* He lives at Somerville and is a painter and a member of Local No. 734, having been a member since April, 1924; before that he had not been a union man; he was employed by the complainant on the Somerset Hospital job and had worked about six weeks when, "I was taken off the job by the business agent"; the business agent's name was Hoffman; he went back to work after the injunction and at the time of the trial was still working on the job; and the wages that are being paid now are the local wages for Somerville; he had always been paid the local wage scale and worked half a day on Saturdays; the local practice is followed.

On *cross-examination,* the witness said: He attended practically all of the meetings of the union after he joined; he does not remember any communication being read at any meeting from the State Council of Painters, drawing attention to the rule relating to ten and a half dollars a day from the New York contractors; he does not remember any conversation at the union meetings about it; he does not remember hearing it discussed on the floor of the unions; the union did not pass a resolution just before this strike that the rule of the union should be enforced on that job; he sometimes stays at the meetings until all the business is through, sometimes not; when Hoffman came on the job he said: "I will have to pull the job; you fellows are entitled to ten dollars and fifty cents and you can't come back until it is settled and they pay ten dollars

and fifty cents a day"; the witness did not ask Hoffman any questions; Hoffman did not say that at the convention of the United Brotherhood or of the Brotherhood of Painters held in Dallas the constitution was amended containing that provision; Hoffman said that the payment of the local rate was against the rules of the union. The following then occurred:

Q. He did tell you that it was against the rules of the union. Now, then, when you say he pulled you off, or pulled the job——

A. That is what he says, have to pull the job; that is what he said.

Q. He didn't say, "If you men continue working after today, you will be violating the rules and you will be liable to fine or suspension"?

A. Yes, sir.

Q. He told you that, didn't he?

A. Yes, sir.

Q. So that he did say something else besides "I will pull the job." Now, tell us all that Hoffman explained to you when he was there that day.

A. Well, he come to the foreman. He says, "I will pull the job"; he says, "You fellows can work until 4.30," and that is——

Q. And that is all? Didn't say anything else?

A. Well, he said until they agree to pay ten-fifty a day.

Q. Didn't say anything else?

A. I don't know.

Q. I thought you said a minute ago that he said that it was against the rules of the union to work for less than ten and a half a day on that job?

A. That is what he said.

Q. Yes; and that was all he did say, wasn't it, that it was against the rules of the union to work for less than ten dollars and a half a day on this job and if you

continue working after today you will be doing it in violation of the rules; that is what he told you, isn't it?

A. Yes, sir.

MR. CARLESS: That is all.

RE-DIRECT EXAMINATION.

By MR. LANE:

Q. He told you to quit at 4.30 and not come back, didn't he?

A. Yes, sir.

RE-CROSS-EXAMINATION.

By MR. CARLESS:

Q. Well, now, which did he tell you? Did he tell you that you had to quit, or did he tell you that if you continued working you would do so in violation of the rules; which was it?

A. Well, the answer is the same, isn't it?

Q. What is that?

A. That is what he said; unless they pay ten and a half a day.

Q. What?

A. You couldn't come back to work.

Q. Yes, because if you did, you would be violating the rules; and he didn't say you have to quit; he didn't use that word "quit" at all, did he?

A. Well——

Q. Don't know whether he did or not.

By JOHN S. KELLEY, on *direct examination* as follows: that he is a master painter and has been such for twenty-five years; his work has extended over the states of Connecticut, New Jersey, New York and Pennsylvania; his home place in New York City; dur-

ing a period of twenty years he has been estimating on competitive work through these various states; he has come in contact with other master painters in competition; he has talked with the other master painters with respect to the way work was figured, and so forth; he is familiar with the way in which master painters compute all the calculations they use in figuring on competitive work.

On *cross-examination,* the witness said that he now has only a small contract outside the State of New York at Elizabeth, New Jersey, a building for the Central Railroad Company of New Jersey; he can recall no other job at the time outside of New York State.

On *direct examination* continued, the witness testified that he had been talking about the jobs he had at the present time; up to a year before he had had contracts in the various states he mentioned, running "five thousand, eight, $10,000; some more, some less." And thereupon the following occurred:

Q. And why is it that you haven't any jobs except these two that you refer to outside of New York?

A. I have refrained from figuring work——

Q. Why?

MR. CARLESS: Now, your Honor, I object to the question as to why he hasn't any jobs, or why he doesn't figure.

MR. LANE: Well, I am going to show he doesn't figure because the whole claim is the effect of this rule upon the foreign contractors, and I am going to show that this man, who is a foreign contractor, does not figure because of this rule.

THE COURT: If it can be linked up with that I will allow that line and allow an exception to the ruling.

Q. Why do you refrain from figuring now on work other than in your own home district?

MR. CARLESS: Exception, your Honor.

THE COURT: Yes, I asked that the exception be noted.

A. Why, I knew of this union rule compelling me to pay the New York rate to the local painters and I know that I am figuring against local bosses who would not have to pay the New York rate. I therefore think I would be wasting my time in making estimates.

Q. So that it is impossible for you to do it?

A. I think so.

The witness testified that he did not know of any practice on the part of master painters prior to the adoption of the union rule, in figuring on foreign work, basing their figures upon the wage scale local to the place from which they happened to come; the contractors always based their figures on the local scale where the work was performed; they could not get the work if they did not figure on the local wage scale; the industry is very competitive and has been highly competitive for twenty-five years; the industry is unionized on new work where there are trades other than the painters, practically 100 per cent. all over the United States except there may be one or two towns where there is a chance of an open job; it is the country generally; the entire building industry in New York, New Jersey, Connecticut and Pennsylvania is a 100 per cent. union; it is not practical for him as a contractor to do any painting work without the use of union labor; if he should try to do one job of painting with non-union labor, the union men would not work for him on any other job and if he did only one job with non-union labor and tried to do a new job, the other trades would quit; that has been a condition in the building industry well known to everybody in the trade for a long period of years.

On *cross-examination* the witness testified that on the job in Elizabeth he used two New York men, all who were employed; he figured on New York rates, because it was only a little thing; in addition to paying his men ten and a half and working them five days a week, he had to pay their carfare; the last job he had in New Jersey prior to the Central Railroad job may have been two years ago; he has not figured a job outside of New York State of over $10,000 during the past three years; the reason he did not was not because he could get plenty of work right in New York City and New York State; he runs his business himself; while complainant is three or four times as big as he is, his business is not in a different class of work; he is painting and decorating a bank in Coney Island at the present time; his concern is absolutely on a par with complainant as to kind of work performed; he is very friendly to complainant.

On *re-direct examination* the witness testified that the volume of his business last year was approximately two hundred thousand dollars.

By LOUIS HASS, on *direct examination* that he lives in Jersey City, New Jersey, and is a painting and decorating contractor and has been twenty years in the business under the name of J. I. Hass, Incorporated; that corporation is the J. I. Hass, Incorporated, which was the plaintiff in the suit in the United States District Court against a local of the painters' union in Connecticut; he had been performing painting work prior to the adoption of the challenged union rule in the States of Connecticut, New Jersey, New York, Pennsylvania, Massachusetts, and some other cities, but mostly Pennsylvania, New York,

Connecticut; he is familiar with the different wage scales that were existing and are still existing in the different territories; they vary in different districts; in New York the wage scale is ten fifty; in Jersey City ten fifty; in Connecticut they have different wages in different towns; they had from eight, nine—he does not know what they are now because he hasn't been up there since last fall; eight or nine, he thinks; in other parts of New Jersey there are different wage scales, he thinks from eight up; if he were figuring on a job in Washington, he would naturally figure the lower wages because he wouldn't be able to hire, bring men from New York to go to Washington and if he did not figure on the local wage scale, he would not get the work as against local competition; the painting industry is competitive; the attempted enforcement of the rule had an effect on his business because he hasn't gone out of town as much as he used to before because he could not compete with the local painters; whenever he went outside his own territory he had to do the best he could; he had a job only last fall in Hazleton, Pennsylvania; he was working there, almost completed, when the delegates came and stopped the job; they telegraphed for him; the effect of the rule has reduced his business almost $400,000 a year; last year he did about $650,000 of business; the painting industry in the states previously mentioned is 100 per cent. unionized; the other building trades he believes to be all union; it is not possible for him to do any painting work with non-union men because the other trades wouldn't work with them; he cannot work union in one territory and non-union in another "because you can't be union one place and be unfair in another place."

On *cross-examination* the witness testified wherever his work has been the trade has been 100 per cent. unionized; therefore he has always hired union

men and did not try to hire non-union men; he did not hire non-union men at the time of the strike and during the war they did the best they could; during the strike he hired men without knowing whether they were non-union or union, he didn't ask the question; he hired them to do the work; that was all he was interested in; he knows what would happen to him if he hired non-union men. "They would pull me all over the country"; when he had a strike they just struck in one place where he was doing business and he wasn't going all over at that time; at the time they had a strike in New York and he was working in Newark the other trades pulled his jobs all over; he is a painter, not a general contractor but knows that if anybody comes non-union on the job, all the trades go off in sympathy; if a non-union painter came on a job the other delegates would pull off the other trades; he has seen that happen several times; the last time was the week before he testified at Jersey City; there was a man started non-union and they took all the other trades off; he cannot tell the next one prior to that; he is employing union men. The following then occurred:

Q. As a matter of fact, you know it is very very seldom that any strikes occur insofar as the erection of buildings is concerned; it is very seldom, isn't it?

A. Well, I tell you, you must know more than I do, because you seem to be talking facts. You know more than I do about it because I told you—you asked me about non-union painters and I told you about it, but I can't tell you about strikes; I am no delegate. I can't pull the men off. All I can tell you is about myself.

The following then occurred: Plaintiff offered in evidence extracts from the Constitution of the International Brotherhood of Painters, Decorators and Paper Hangers of America, which was marked "Exhibit P-2."

Plaintiff then offered in evidence the rules of District Council No. 10, Brotherhood of Painters. The offer of this exhibit was objected to in the following language:

> Mr. Carless: Now, your Honor, I object to that. There is no District Council of Painters involved in this suit. In the other suit, one of the defendants was the District Council of Painters No. 10, which is located here in Essex County, but there is no District Council in Somerville. There is just that one local union that has members from Somerville and the surrounding townships. So that I object to that.

And thereupon the following occurred:

> Mr. Lane: Well, it is evidential, if your Honor please, under the charges of the bill, because we charge in the bill the way in which this association or organization is made up. The International Association itself is a party to this bill and the local is a party to the bill, and we say that the organization is made up in certain ways; to wit, by the International organization and the locals and the district councils, and that each of them has a constitution. Now, to show the structure of the union, it seems to me we are entitled to show the constitution of this District Council.
>
> The Court: But that is a council that isn't brought in, either in the line of its organization or through its personality, into this suit.
>
> Mr. Lane: No, it isn't a party to this suit.
>
> Mr. Carless: No, sir.
>
> Mr. Lane: Do you say that the Somerville——

THE COURT: The Somerville territory isn't concerned with the district council.

MR. LANE: Do you say that the Somerville local is not a member of this district council?

MR. CARLESS: No; it isn't affiliated with it in any way.

The rules were marked "Exhibit P-3," and thereupon the following occurred:

MR. LANE: Now, I offer in evidence a letter on the letter head of the Brotherhood of Painters, Decorators and Paper Hangers of America, dated December 5, 1921, Complainant's Exhibit No. 5 in the other suit, printed on page 177. That is a letter from the secretary of the Brotherhood which was sent out to all the master painters drawing attention to this rule. I suppose you will stipulate, Mr. Carless, that Mr. Rosenthal will swear that he received a copy of that letter. He did so swear in the other suit; I haven't asked him that question in this suit yet.

MR. CARLESS: Well, I suppose you can prove this letter anyway again and I might as well stipulate as to it. But this letter, your Honor, is dated December 5, 1921, which is more than three years ago.

THE COURT: That is the letter that was builded upon the Dallas Council?

MR. LANE: Yes, your Honor; that is the letter that was sent immediately after the adoption of this rule to all master painters, drawing their attention to this rule.

THE COURT: I suppose if that is the result, if that is the form letter that went out, why it is perfectly pertinent.

MR. CARLESS: It is the form letter.

MR. LANE: Yes, it went out, that there was such a rule in existence.

(The exhibit was marked "Exhibit P-4.")

And thereupon there was offered in evidence the challenged rule and admitted. It is a part of Exhibit P-2, being a part of Section 132 which reads as follows:

> "When a contractor, builder or boss painter does any work pertaining to our trade outside his home city or town—and in a locality where a District Council or a Local Union exists—not less than fifty (50) per cent. of the men in such district shall be employed on all work coming within the jurisdiction of the Brotherhood of Painters, Decorators and Paper Hangers of America as defined in the General Constitution."

By GEORGE W. HOFFMAN, a defendant herein, called on behalf of the plaintiff, on *direct examination;* he lives in Somerville, New Jersey, and is a business agent, representing the Somerville Building Trades Council which is composed of carpenters, plumbers, electricians, painters and laborers; it has a constitution and rules but he does not know where they are; the whole thing is that the by-laws have been exhausted, and they were made in 1913, and there have no new ones been issued since then; he believes he has a copy that is all marred with ink; but he hasn't got it with him; the Somerville Building Trades Council keeps a minute book and he believes the by-laws and constitution are in that minute book; the secretary of the Building Trades Council is William Fitz; Mr. Warren is state organizer of the painters and decorators; prior to whatever conversation he had with the men on the job of the Barker Painting Company at the Somerset

Hospital, he had discussed the matter with Mr. Warren; he looked up the constitution of the painters, the Brotherhood. The following then occurred:

Q. Mr. Warren knew what you were going to do?

A. I didn't do nothing.

Q. If you did anything did Mr. Warren know what you were going to do?

A. No, I don't think he would.

Q. How did he happen to come to Somerville?

A. That is more than I know, only that there were rumors around that the injunction was taken off and the painters should receive the New York wages there.

Q. Well, how did he—where does he live, do you know?

A. Warren?

Q. Yes?

A. I believe in Trenton.

Q. And he came up from Trenton to Somerville to see you?

A. Yes, sir.

Q. On this matter?

A. I believe it was that. He appeared before the Building Trades Council.

Q. And discussed this matter in the Building Trades Council?

A. Yes; and showed a decree of the court.

Q. That is the decree of the Court of Errors and Appeals—or the decision of the Court of Errors and Appeals?

A. The Chancery Court, it was; I believe it was the Chancery Court.

Q. The decree which permitted the painters to enforce the rule?

A. Yes.

Q. Yes. That was the decree of the Court of Errors and Appeals or the reversal of the Court of

Chancery; and he attended a meeting, do I understand, of the Building Trades Council?

A. Yes, sir.

Q. And brought to the attention of the Building Trades Council this fact?

A. To me personally; he was there, but he showed me the constitution and section of the law.

By ARTHUR J. ROSENTHAL, recalled testified on *direct examination* that the Barker Painting Company never agreed to comply with this union rule, so called, regarding the payment of the differential between the wage scale; the materials which are used by the Barker Painting Company in painting are purchased generally at the shop in New York and as the different jobs are done in different districts they are sent to the job from the shop in New York, although if a job is starting in the neighborhood they might be sent direct to the others; the large amount of material is purchased in New York and shipped; sundry things are frequently bought right on the job but the large amount is purchased in New York and then shipped to the local place where the work is being done; that is a practice which continues right down to the present time; Mr. Lemmer, who was the foreman on the job, is on his way to Los Angeles; he was taken sick with rheumatism which finally affected his heart and he was ordered out of the country immediately; he left a week before the witness testified, on a boat going through the canal, with his family; plaintiff had no opportunity to make any arrangements whatever with respect to taking his testimony; witness saw the man for a few minutes and he was in a bad condition, crippled.

On *cross-examination* the witness testified: the agreement that he had with the painters to employ only

members of the union, was an association agreement; he is a former president of the employing master painters association and is the vice-president of the employers' association of all trades; he is not an officer of the master painters at this time; the agreement that he refers to was an agreement between the employing painters association—and District Council No. 9; it was signed by the officers of the association for the association, representing all the members of the association; the last agreement expired on the thirty-first of December, past; it was made a year before, maybe a month before that; it was a one-year agreement; it is just being renewed now; they are working on it; at the time he entered into the contract with the Somerset Hospital, the agreement was in force; that agreement did not require him to live up to the rules of the unions; it is strictly an agreement with the council of painters, not with other trades; aside from wages and hours, it simply gives working rules between them in New York; it says nothing about the International constitution, or anything of that kind; they don't permit that to go in. The following then occurred:

Q. But according to the agreement that you have with District Council No. 9 in New York, that agreement provided that you must live up to the rules of the Brotherhood of Painters and Paper Hangers?

A. It did not.

Q. Sure of that?

A. Why, we wouldn't agree to live up to their rules; they don't even ask it.

Q. Don't ask it?

A. No.

Q. But you did live up to their rules when you were doing the Westinghouse job here?

A. No, not because it was their rules, because it was my custom.

Q. Because it was your custom, then, to work these men in Newark only the five days and pay them ten and a half a day, you did that——

A. Well, I will tell you something, Mr. Carless; since we have been working five days I like it, and if I had the chance to go back to five and a half I wouldn't do it. I like my Saturdays, myself.

Q. And on the Firemen's Insurance job, too, you did the same thing?

A. Yes. Oh, I do it on all my jobs. If they want their five days, they may have them; just so they don't ask the higher wages.

The following then occurred:

MR. CARLESS: If your Honor please, I don't want to be precluded from putting in some testimony in this case this morning upon my making a motion to dismiss the complaint, but I desire to move to dismiss the complaint at this time on the ground that the evidence so far does not show that the defendants in this proceeding have been guilty of any act that can be construed as an unlawful act; that they have acted within their legal rights, and in accordance with the decision of the Court of Errors and Appeals in this State in the case of New Jersey Painting Company against Local Union 26 of the Brotherhood of Painters, Decorators and Paper Hangers; the Court has decided that the rule is a legal rule, not violative of any legal right of the complainant. Under those circumstances, for the purpose of the record, I would ask your Honor to grant my motion to dismiss the complaint.

THE COURT: I will deny the motion, Mr. Carless.

MR. CARLESS: And grant me an exception.

THE COURT: Yes, sir.

DEFENDANTS' EVIDENCE.

And thereupon defendants to maintain the issues on their part joined, offered evidence as follows:

By GEORGE W. HOFFMAN, a defendant, on *direct examination:* he is a carpenter and the business agent representing the Somerville Building Trades Council; he is familiar with the work being done on the Somerset Hospital in Somerville by plaintiff; he did not at any time in January or February go to this job and order, in any language, the employees of the Barker Painting Company to quit work; he did not say to any of the employees, "You fellows can't continue here; you will have to let today be your last"; he did not say anything to either of the men that he was pulling the job; he showed them the clause in their constitution that they were violating and also a violation of their own rule which they passed at their local meeting a night previous to this time; he said it was their rule so they will have to stop work; they had decided at their meeting to stop work; they went to work that day because they couldn't get in touch with him, they were waiting all day and the foreman was taking it up with Rosenthal; witness has been connected with building trades council; he has been a union man for twenty-seven years, and been a delegate representing the carpenters for three or four years; not all of the trades are affiliated with the respective building trades councils; the bricklayers and masons, lathers and the sheet metal workers, tile setters do not belong to the Somerville Building Trades Council; as the business agent of the Building Trades Council, he has no power to pull a job or order men off a job; according to their laws, no man can quit work before he brings it up to the executive committee of the Somerville Building Trades

Council, if he does so, it is voluntary; the Building Trades Council of Somerville did not take any action whatever with regard to the Somerset Hospital job.

On *cross-examination* the witness testified he went down to the job at the hospital because it is his duty as a business agent; he is supposed to visit these jobs so that if there are any minor disputes to be settled to try and settle them and to see that the men have their dues paid and to see that the men are union men and if they don't belong to the union to try to get them to join the union; he had been going to this job two or three times a week regularly; he had the conversation with the men with respect to the rule because a State Organizer of the Painters, on February 10, Mr. Warren informed him that they were not living up to the constitution.

The witness then said:

A. On February 13, I went to the local meeting of 734, brought it up there, showed them the constitution; the men agreed to live up to the constitution. At that time, there was no men working at the Somerville Hospital—painters. On February 20, the foreman came out, drummed up his men, and I wasn't in town; they looked for me, and in the afternoon, oh, I should judge maybe two or three o'clock, they came to me and they said "What shall we do?" and I said, "What did you pass at your meeting?" Well, they said, "We worked until half-past four," and they were expecting Rosenthal to be out there. That is what the men told me. Then, at half-past four, they didn't go back to work after that.

The witness testified: Mr. Warren spoke to him before the meeting of the Somerville Building Trades Council; he came out to see the witness; witness had never met Mr. Warren before then; Mr. Warren showed the witness the constitution of the painters requiring

the higher rate of wage and also the decision of the Court of Errors and Appeals of New Jersey in the case of New Jersey Painting Company against the painters; the witness knew that the job was under way at the Somerset Hospital at the time; it had started in November and work had been done with local help, paying the local wage; the following then occurred:

Q. You knew that?

A. Yes, sir. I knew also that there was a court injunction that I couldn't insist on that higher rate.

Q. And that is the reason why you didn't insist?

A. Pardon me?

Q. And that is the reason why you didn't insist?

A. Well, after I was shown the appeal and the decision in favor of the Brotherhood, I knew then that it was the law.

Q. Yes, and was this matter taken up at the meeting of the Trades Council?

A. Just—I asked the privilege of Mr. Warren to address the Council on the floor so they would know the conditions.

The witness testified: the date of the meeting of the Trades Council was February 10; there was represented at the meeting painters, carpenters, plumbers, electricians and laborers; Mr. Warren was present and the matter was brought to the attention of the Council; Mr. Warren showed the decision of the court and addressed the Council and told the Council about this decision:

The following then occurred:

Q. Why did he address the Council about it?

A. Because that was the only place he knew he could find me and for courtesy sake.

Q. But if he had talked to you, why was he addressing the Council?

A. Well, that is a matter of extending courtesy to an organizer; we do that to all.

Q. But what interest had the other trades represented there in that Council, what had they to do with this painting matter?

A. Well, we like to hear the court decisions and of course it was in favor of the Brotherhood of Painters; we rejoiced in it.

Q. It is a part of your constitution, is it not, that the union men will not work where there are non-union men employed?

A. Well, that is up to the members themselves.

Q. It is part of your rules, isn't it?

A. I told you the last time we have no more rules. I never seen the rules, outside of an awful dirty, ink stained copy and nobody can read it.

Q. Well, you were going to produce one, you said you could get one; have you produced that here?

MR. CARLESS: He said he would try.

MR. LANE: Well, he said he would try.

A. No, sir, I haven't.

Q. Have you tried to find it?

A. Yes, I did try, and to be honest with you, I did have a copy and I forgot it this morning.

Q. Then there is such a copy in existence?

A. I found one, yes.

Q. Now, isn't there a provision in that constitution—have you read it recently?

A. Yes, last night. I left it home in the dining room, that is the honest truth.

Q. Isn't there a provision in that constitution that the union members, the members of the unions will not work with non-union employees?

A. I believe there is.

Q. Yes. And that applies to all the trades, doesn't it?

A. That is affiliated with the Council, yes.

Q. All the trades that are represented on that Council?

A. Yes.

Q. And the trades represented on that Council are whom, are what trades?

A. Laborers, carpenters, plumbers, painters and electricians.

By HERMAN LANDOW, on *direct examination:* he lives at 17 Rockland Terrace, Vailsburg Section, Newark, and has been a member of the Brotherhood of Painters, Decorators and Paper Hangers of America for twenty-three years; he is business representative of the painters, jurisdiction Council No. 10; Essex County, and was one of the defendants in the suit of the New Jersey Painting Company against the local union; he held various offices and has been business agent or business representative for the last eighteen years; he knows the Barker Painting Company during the last year has had work in the vicinity of Essex County; it is at present working on the Western Electric job in Kearny; it finished up the New Firemen's Building, on Park Place; he is familiar with the wages and hours of labor that were paid on those jobs; they paid the New York rate, ten-fifty per day; worked five days a week; that was because the rate of wages in New York was ten-fifty and the number of working days in New York five days; there is a rule in the national union relating to the payment of these higher wages which has been in effect to his knowledge, fifteen or sixteen years; it was in effect prior to the so-called Dallas convention that was held in 1923; he identifies a book as containing the general constitution of the Brotherhood amended January, 1920; section 62 was in effect in January, 1920, and a similar section had been in force in the constitution

of the Brotherhood of Painters for a number of years prior to that time. Thereupon section 62 was admitted in evidence as Exhibit D-1.

The witness then said: the delegates at the Dallas convention changed that law from 50 per cent. being employed in the localities they go into—they wanted to change that that the employer from an out of town district can go to another district and employ a 100 per cent. of their own men; that was done actually at the last day of the convention when the smaller locals had left the convention for their homes; practically New York and Chicago, being the big metropolitan cities, put it across; after the convention adjourned the action went to the membership and they protested and had a referendum vote throughout the country; the proposition was turned down by a general vote of the union and reverted back to the 50 per cent. law; the Dallas convention voted for the change but it was re-enacted by the referendum vote; and as a consequence the constitution of the international union was the same after the convention as before.

The following then occurred:

Q. Now, do you know, Mr. Landow, as to the reason advanced by your unions for the adoption of this rule regarding the higher scale and the shorter hours?

A. Well, the way I interpret it——

Q. No, what is the reason advanced by your organization for this——

A. Why, to stop dissension and turmoil on jobs.

Q. Now, how does this dissension and turmoil arise without this clause?

A. Why, when an employer comes into our jurisdiction with a higher rate, and we furnish men to him also, at the lower rate, why there is a turmoil there, because one mechanic is as good as the other and they feel as if that they ought to have the same wage on the one job.

Q. Well, what can you say as to the opportunity for the employer who comes out of town to get all local men to work on the job? Can he do that?

A. As a rule, the majority of the times no, he can't do it, because our own men that are steadily employed with the home employer would not go to work and leave their employer to go to work for an outside employer just temporary, to finish one operation.

Q. And when the out of town employer, such as the Barker Painting Company, the Jersey Painting Company, and other big concerns figure on jobs outside of their own home cities, what standard of wages and hours of labor do they use in making their bids?

A. In my connection with several of the employers they always claim they estimate on their home town work; that is, their home figures.

Q. On the rate of wages paid where their business is located?

A. Yes, sir. I will explain, if you wish, the reasons.

Q. All right.

A. I have spoken to several outside employers and the reasons were this: that they were never sure of getting men in the locality that they were going into, and for that reason they always had to figure on the higher rate of their home town.

THE COURT: Isn't the obligation upon the outside employer to employ at least fifty per cent. of the men in the place where the job is to be done?

MR. CARLESS: Yes, sir.

THE WITNESS: Yes, sir.

THE COURT: What is the outcome in case of the impossibility of securing local men to leave their steady employment, so-called?

THE WITNESS: May I answer?

THE COURT: Yes.

THE WITNESS: Why, we allow them to bring in their men.

THE COURT: In an emergency of that sort, the rule is elastic, is it?

THE WITNESS: It is not—it is elastic. I mean, in explanation, this, there are several times that an employer comes into our jurisdiction that they cannot get the fifty per cent. quota.

Q. And then in that case?

A. And in that case we allow them to bring their own men in, or wherever they can get them from.

On *cross-examination* the witness said he was present in court on the last day that the suit brought by the New Jersey Painting Company was tried; he knows Joseph F. Kelley, vice-president of the Brotherhood; he did not hear him testify.

Thereupon the following occurred:

Q. Well, now, I ask you whether what I shall read to you from his testimony will refresh your recollection. In the first place, he said that he was present at the Dallas, Texas, convention. You said you were not present.

A. I said what?

Q. You were not present at the Dallas, Texas, convention.

A. No, sir.

Q. He was, so he says. Now, he said, in answer to the question——

MR. CARLESS: What page?

MR. LANE: On page 111.

Q. With respect to the rule requiring the higher rate of wages to be paid: "Q. When was the amendment adopted, Mr. Kelley? A. The amendment, as in its present form, was adopted at our Dallas Convention. Q. Which was held when? A. In September, 1921." Now, does that refresh your recollection that the rule, the amendment was actually adopted at the Dallas convention in 1921, requiring the payment of the higher rate of wage?

A. That was prior to the Dallas convention.

Q. Well, was that rule, if in your constitution, enforced prior to the Dallas convention?

A. I will answer this way: there are several members belonging to the Brotherhood that do not understand its constitution but where they do understand its constitution they enforce the laws.

Q. Well, never mind whether they understand the constitution or not. As a matter of fact, don't you know that your constitution, if it did require the payment of the higher wage before the Dallas convention, was not enforced?

A. I answered that question, Mr. Lane, previous.

Q. Well, was it enforced or wasn't it? I didn't hear you.

A. In various sections, yes, where they understand the constitution.

Q. Well, in various sections, no?

A. That I can't answer.

Q. Was it enforced here?

A. Yes, sir.

Q. Absolutely?

A. Yes, sir.

. . . . . .

Q. Can you explain to me, if the amendment was in effect—have you any knowledge as to what old scale there was?

A. In what section do you refer to?

Q. In the metropolitan section.

A. I don't represent the metropolitan section so therefore I couldn't answer what their laws or wages were at the time.

Q. Then you are simply speaking for Newark?

A. I am speaking for Newark jurisdiction and the general constitution as a whole.

Q. Newark jurisdiction includes what?

A. Includes Essex County.

Q. What else, if any? Does it include anything else?

A. As far as I am personally concerned?

Q. Yes, you say you are speaking for the Newark jurisdiction; now what I want to know is what the geographical limits of the Newark jurisdiction are?

A. Why, all of Essex County.

Q. And that is all, doesn't go outside of Essex County?

A. As far as the wages and hours of Newark is concerned?

Q. No——

A. You are trying to get me——

THE COURT: No, he is not.

Q. I am not trying to do anything.

A. But I am trying to answer it as near right as possible. Now you are asking me a question; I am trying to answer it as near as I possibly can.

MR. CARLESS: All right, Mr. Landow.

Q. What is your jurisdiction, the geographical limits of your jurisdiction?

A. As an international or a local?

Q. No, as a local that you represent.

A. Why, it represents Newark.

Q. Yes.

A. Belleville, Arlington, Kearny, Irvington, and as far as the city line of Elizabeth.

THE COURT: Are there any parts of Essex County that it does not represent?

THE WITNESS: The District Council?

THE COURT: The local that you have just been speaking about.

THE WITNESS: Yes, sir, there is Orange; that has a local of their own; and Montclair has a local of their own; Elizabeth has a local of their own.

By MR. CARLESS:

Q. But you are the business representative of the District Council, aren't you?

A. Number ten; yes, sir.

Q. And that District Council has jurisdiction over all of Essex County, doesn't it; District Council No. 10 has jurisdiction over all of Essex County, over the whole of Essex County?

A. They have, but they have allowed Orange and Montclair to go out of the District Council and do their own business in that district.

By MR. LANE:

Q. If that rule was in effect prior to the Dallas convention, will you tell me why it was that the letter, which is in evidence in this case, was sent out by the secretary of the International Union to all contractors employing members of affiliated local unions of the Brotherhood of Painters, Decorators and Paper Hangers of America, reading as follows:

"I have been instructed by the New York District Council No. 9 to notify all our fair employers of the following amendments to our General Constitution passed at the last Convention held at Dallas, Texas.

"1. An amendment abolishing the fifty per cent. clause. This gives the employer the right to employ all his men in his home town to work on a job removed from the said home town, or the further right to employ the full quota of men required to carry on the work, from the membership of the local or locals in the city, town, &c. where the job is located.

"2. An amendment providing for the higher scale of wages to be paid to all men employed. In the event that an employer contracts work in a locality where the wage scale is higher than that prevailing in the jurisdiction of his home city or town, the higher wage scale must be paid to all men engaged by him, irrespective of whether they are employed in the locality where the work is being done, or in his home city, town, &c.

"The above-described amendments are in full force and effect. You are therefore kindly asked to be guided accordingly."

Now, your international secretary, on December 5, 1921, notified the contractors that an amendment had been passed by the Dallas, Texas, convention, providing for this higher wage; now you say it was in force and effect a long time ago.

MR. CARLESS: What page?

MR. LANE: 177.

Q. What is the explanation of that?

A. The only thing I can explain is this: When the secretary had sent out this notice and when there was an amendment placed before the convention and carried on the hundred per cent. clause and doing away with the fifty per cent. clause, why they had written it out that way.

Q. I only read that part of it in order to give you the context of the entire letter. What I am interested in is the second part of this letter, in which he draws

the attention of "fair contractors" to the fact that an amendment providing for this higher wage had been passed at the Dallas, Texas, convention. You say it wasn't passed at that convention; you say it was in the constitution, always in the constitution and enforced, and I am wondering why it was that your international secretary, if that is so——

MR. CARLESS: Well, he isn't the international secretary.

MR. LANE: Well, I beg your pardon.

Q. (Continuing.) —the secretary of the Council No. 9, why it was that he sent out this notice to the "fair contractors" notifying them of an amendment.

A. Well, that is true, Mr. Lane; you said the secretary, general secretary; this was Zausner, of the——

MR. CARLESS: No.

Q. No, it was McMurray.

A. That is right; McMurray was secretary, pardon me; McMurray sent that notice out after he got word from the Dallas convention that they had carried the hundred per cent. of membership going into another locality and he quoted the whole section. That don't say that the section of the International wasn't in prior to the Dallas convention, which these different by-laws shows. I knew that you were—if you had told me in the beginning New York, why, I could have answered it more intelligently.

THE COURT: Do you mean that the amendment that provided the feature of the hundred per cent. also included the language covering the matter of the higher wage?

THE WITNESS: Yes, sir.

THE COURT: That it was all one amendment?

THE WITNESS: They had it all in the last amendment of doing away with the 50 per cent., making it 100 per cent., in the Dallas convention, as I stated in my testimony prior. When a majority of all the small organizations had gone away, New York and Chicago combined and they passed this motion of a hundred per cent. in sending their home town into any other district.

THE COURT: The other feature is a part of the same section?

THE WITNESS: The 50 per cent. was a feature of the old law; the hundred per cent. was the Dallas law.

THE COURT: But was the feature regarding the higher wage a part of that same section?

THE WITNESS: Yes.

THE COURT: So that it was quoted by Mr. McMurray in its entirety?

THE WITNESS: Yes, sir.

THE COURT: But in reality, you say, the only new feature was the wages—the feature regarding the hundred per cent.?

THE WITNESS: That is all; the old feature was there with the fifty per cent.

MR. LANE: I don't think I will cross-examine very much upon that point. Counsel have stipulated that the testimony taken in the other case, so much of it as may be material and relevant in this case, may be read into the record, and I examined Mr. Kelley and I shall put in Mr. Kelley's testimony, Mr. Kelley having been present at the Dallas convention.

By HARRY S. WARREN, a defendant herein, on *direct examination,* he lives at 1117 South Broad Street, Trenton, and has lived in Trenton practically all his life; he has belonged to the Brotherhood of Painters, Decorators and Paper Hangers of America for close to fourteen years, he is general organizer of the International, and as such has been covering New York, Long Island, New Jersey, Pennsylvania; he is familiar with Section 132 of the present constitution of the International Union; that clause of the constitution has been a part of the International constitution of the Brotherhood of Painters and Paper Hangers since before he was a member; he was business agent for practically ten years before he was general organizer, and the clause was in force, the higher rate, and of course the day at his time was practically the same; Section 62 indicated by Exhibit D-1 has been in force all the fourteen years; at the Dallas convention, practically around the last day, when a number of the delegates from the larger cities had left at the convention, they attempted to eliminate the fifty-fifty clause in Section 62, leaving the higher rate; that would mean that the contractor, taking work in a city other than his home city, might have on the job one hundred per cent. of employees coming from his home city; a number of the locals in the different states got together and demanded a referendum vote; the constitution of the International provides that any matters of this kind may be submitted to a referendum vote; as a result of the referendum vote, the fifty-fifty clause was placed back in the constitution, or practically it wasn't taken out, but it was voted to stay in there, fifty-fifty, so that after the referendum vote, the constitution remained the same as it was before the Dallas convention; as an officer of the International Union, that before the Dallas convention the rule relating to the higher rate of wages was enforced; he

cannot say it was enforced everywhere, but in a majority of places it was enforced; in the performance of his duties, he comes in contact with employing painters; the following then occurred:

Q. And do you know as to when they figure on jobs in cities outside of their home city, what rate of wages and working hours they use in making their estimates?

A. I have had the employers to come and ask me what the rate was in the locality that they were figuring on, and they have asked by figuring the higher rate would they be able to get some men down there, and naturally I told them I couldn't guarantee them any men, and they would have the excuse that they couldn't really stand to take all their men from their home city, as they have enough work to keep them busy there.

Q. Well, then, what rate would they use in figuring?

A. The higher rate.

The witness then said: in the State of New Jersey there is a difference in the rates of wages paid to the members of the National Union. In Trenton the rate has been ten dollars a day, forty hours, since April 1, 1924; in New Brunswick, nine dollars; in Atlantic City, ten dollars at the present time, it was nine until April 1, 1925, he knows of contractors in Trenton who did work outside of Trenton, one being the J. E. Margerum Painting Company, which does a great deal of large work all over, practically, the state; whenever that company went into a locality where the wage rate was lower than in their home city, they paid the Trenton rate, the higher rate, and that is true of all the other employing painters in New Jersey, he has never heard tell of an employer in New Jersey going anywheres and paying a lower rate than what their own is.

The following then occurred:

Q. What is the reason advanced by your national union for having this apparent discrimination, difference in rates?

A. Why, we claim there ought to be but one rate on the job because if there is two rates or more it is sure to cause trouble, there is more or less jealousy between men, you know, and if one man gets more than the other that is going to cause some trouble if that is done.

The witness said that: in the performance of his duties he has an opportunity to acertain the make-up of the different building trades councils in the different sections of the country, and it is not true that all of the building trades are always in these Building Trades Councils; the bricklayers do not always belong; bricklayers and plasterers are not affiliated anywhere in Monmouth County, New Jersey; they have just recently in the last week or two, affiliated in Atlantic County; the carpenters are not affiliated in Atlantic County; in Essex County the carpenters are not affiliated; in Somerset County, there is a number of crafts out; he believes that there is only one Council in the State of New Jersey that has got a hundred per cent. that is, a hundred per cent. of the trades affiliated, and that is Mercer County, at the present time, his home county; some of the trades are tied up with an agreement that they could not give any support; there are some agreements between international unions and employers that in case of strikes on the part of members of other branches of the building trades that their members would continue working; the bricklayers, masons and plasters international union and carpenters international union are the only trades who have such agreements that he can recall; in case of a strike of any of the other branches of the industry, these branches of bricklayers, masons and plasters and car-

penters would not and could not go on strike; he believes the plumbers in Newark do not belong to the building trades council; the roofers were out but have just recently affiliated in Newark.

On *cross examination* the following occurred:

Q. If the trades do not have these agreements, what kind of support do you expect from them in case of trouble?

A. How was that?

(Question read.)

A. You mean the employers and the men?

Q. Yes.

A. To not to strike or——?

Q. I say if the agreements—if there are no agreements between a particular trade through its International Union with the employers and there is a strike in another trade a member of the Trades Council, what support do you expect?

A. Can't get any if their hands is tied.

Q. All right, if their hands are not tied, what support do you expect? That is what I am trying to get at.

A. Well, in case there is any trouble, we would expect to get support.

Q. And what kind of support, in what way?

A. Well, they try every way to get a job straightened out.

Q. Yes, they would do that even if they had the agreement, wouldn't they?

A. Yes.

Q. Well, now, I want to know something that you expect that they can't do because of their agreement.

A. Well, we don't expect nothing from them.

Q. If they don't have the agreement, what support do you expect is what I want to know.

A. They expect them to work strictly with union labor.

Q. Yes.

A. Union men.

Q. You expect them to sympathetically strike, don't you?

A. No, sir.

Q. Then what did you mean by that?

A. Sympathetic in general with the men.

Q. Would you expect them to strike if the employer in another trade brings in non-union men?

A. Well, I couldn't say; we don't expect them.

Q. Then what do you expect them to do?

A. Expect them to work strictly with union men.

Q. Then what does that mean when analyzed?

A. We can't say that we expect them to strike because some of them you can't get to strike.

Q. No. You expect them to work strictly with union men in the other trades, don't you?

A. Yes, we expect them to.

Q. And you expect them not to work with non-union men in the other trades?

A. Sometimes they go ahead and work.

Q. I am asking you what you expect, not what they do.

A. Expect them to work under the union conditions.

Q. Yes. In the other trades?

A. Yes.

Q. One trade supports the other?

A. Supposed to.

Q. Under the constitution of your District Councils, that is so, isn't it?

A. No; no, I wouldn't say that; the District Council has nothing to do with the other trades. The District Council consists of nothing but painters and paper hangers and glazers.

Q. Not the District Council, I beg your pardon; your Trades Council.

A. Yes, sir—no, not always; don't always say that. Every Council's or local's by-laws, or Building Trades Council's is different.

Q. Then where do you get the idea that they should refuse to work with other than union labor in the other trades?

A. The same as they do from the employers' association. The employers' association has a combination of supporting one another, and naturally the Building Trades Council is under the same idea, that when you are affiliated together, you support one another, but there is oftentimes you don't get the support.

Q. And as a matter of fact, these Building Trades Councils in a great many districts have agreements with the employers under which the employers in combination agree with the employees in combination that all the trades will work, that are in the combination, will work union men?

A. Yes.

. . . . . .

Q. Such an agreement exists between the employers' association of New York and the Trades Council in New York?

A. That is with a proviso; if union men can be furnished.

Q. I mean if union men can be furnished, yes, there is always that proviso.

A. Yes.

Q. Such an agreement exists between the Trades Council of New York and the employers in New York?

A. Well, I couldn't say for certain about that because that is a dual organization in New York and I don't know just which one that the associations are signed up with. Of course we recognize nothing but legitimate Building Trades Councils.

Q. Is there such an agreement between the employers of Newark, the Employers' Association of Newark, and the Trades Council of Newark, the Essex Trades Council?

A. I believe there is.

Q. And that includes all of the trades in the County of Essex with the exception of the bricklayers, plumbers and plasterers, does it not?

A. No, I wouldn't say that; I think the only one that is not in it is the carpenters and the plumbers; but in a majority of cases, the local signs up their own individual contractors. Take the bricklayers; they will sign up their own contractors; the painters will sign up their own employers; the building trades as a whole does not sign up in the City of Newark with the general contractors, not the Building Trades Council, but each branch signs up its own contractors.

Q. They are duplicate, uniform agreements, though, are they not?

A. No, sir, absolutely not.

Q. Well, at any rate, they all provide for the employment of union men upon the building?

A. Not upon any building, not specified in regards to any building in it.

Q. Well, they require that union men should be exclusively employed by the employer.

A. Yes, providing that the union can furnish him men.

Q. Yes. And that employer must work union, and the agreements also provide that the employer must work union men not only in the particular locality in which the work is being done but wherever he is doing work, don't they? It is personal to the contractor.

A. Yes, he is supposed to be fair; if he is fair in one place he must be fair in others.

Q. That is it exactly. The contractors, under the

union rules, cannot be fair in one place and unfair in another?

A. But a number of employers break that rule.

Q. I know it; and when they do break it and you are strong enough, you strike, don't you?

A. No.

Q. You don't?

A. No, sir; not always.

Q. You permit your rules to be violated with impunity?

A. Well, there is a lot of places so far away that when we find out about it that the employers get away with it.

Q. Well, I am always assuming,—if the employer doesn't get away with it and you are strong enough, you strike, don't you?

A. Well, if we find out about it in time, we don't strike but he will simply come along all right.

Q. And if he doesn't come along?

A. Well it is very seldom. I wouldn't say that there would be a strike, because very seldom we have a strike, unless it is asking for an increase, or something like that.

The witness then testified: he doesn't know of any job that was done by a New York contractor at local rates prior to the Dallas convention in this district; he does not know the building of the Memorial Hospital,—the painting of the Memorial Hospital, in Orange; he was not organizer at that time; he was business agent in Trenton at that time; he knows nothing about Metuchen, it was out of his district at that time.

The following then occurred:

Q. I am trying to find out how much you know about the rate of wages paid by New York contractors prior to the Dallas convention.

A. I know in my own district that ten years ago, when the Westinghouse was built in Trenton that Mr.

Haas, of Jersey City, paid the Jersey City rate, which was higher than the City of Trenton.

Q. Are there any other instances that you know of?

A. And all the trades work there was done by New York contractors paying the New York rate. It is true that there is lots of places that our membership at large doesn't understand the constitution and they get by with it, right at the present time. The same way in the case of Somerville. But in the majority of cities throughout, the New York,—the higher rate and shorter work days prevail.

Q. But there are instances, however, where you know that a New York contractor came over and paid less than the—or rather, paid the local rate?

A. No.

Q. Well, you have instanced——

A. I say I have heard tell of it but I couldn't swear to it.

Q. You have heard tell of it but you couldn't swear to it; but you have heard tell of Somerville?

A. Yes, sir.

Q. That is one.

A. That was one.

Q. Yes.

A. But that was misconstrued. I would like to say that during the injunction, restraining order, issued by the Jersey Painting Company, which was very broad, we notified practically—went out and told every organization throughout the State of this injunction against the Brotherhood, also Local 26, and the business agents of Newark, and after this thing was held along instead of going back and telling the position of the Court of Errors and Appeals, we broadcast it in our minutes of our State organization in June, which somehow or other wasn't read at the Somerville organization.

Q. I am wondering what effect the injunction had

to keep down this dissatisfaction that you said was created on the job by two rates of wages being paid, which was a reason for the adoption of this rule in the first instance.

A. Why, I could say that a majority of cases that the New York contractors brought their own men out with them.

Q. Well, they can't bring more than fifty per cent.

A. Oh, yes, yes; if our men refuse to go to work on the job, they can bring a hundred per cent.

Q. I see. And you think some of your men—and they brought their own men with them a hundred per cent., because your men refused to work?

A. Well, I don't say they all refused to work, but the employers in New Jersey today from New York,—they can't employ Jersey men under the fifty-fifty clause because they can't get them and they have to bring them from New York.

Q. Well, do you know of any instance where there was any dissatisfaction caused by the payment of two scales of wages on the same building?

A. Yes, just recently.

Q. Where?

A. On the Barker Painting Company of Asbury Park, last Saturday.

Q. Yes; what happened there?

A. A New York man received seventy-one dollars for his week's work, and the local men from around that jurisdiction, I don't say that they are Asbury Park members, but some they picked up around there, received forty-nine dollars, and there practically was a strike there among all the men, that jealousy.

Q. They are working, aren't they?

A. No, they quit.

Q. Isn't the job going forward?

A. I believe they are getting men from New York

now, paying the New York rate on to it with New York men only there.

Q. This man that got seventy-one dollars was a foreman, wasn't he?

A. I couldn't say that; it was a New York man; he started the noise, he started the trouble down there; he showed them his money, what he got.

Q. Was that the reason why they quit, or did they quit because the Barker Painting Company was violating this rule down there?

A. Oh, no; no.

Q. What?

A. No.

Q. They had been working up to the—when did they start to work there?

A. Oh, since the injunction was on.

Q. Yes; and they had been working there peacefully up to within the last week, hadn't they

A. Well, I couldn't say it was peacefully.

Q. Well, they were working there peacefully up to the hearing in this court.

A. No, they just—practically the job hasn't been started over three weeks, I don't think, three or four weeks at the most, and of course the job is just getting along where they can use some men, I believe, at the present time. It is a hurry up job. Practically I haven't been on the job at all myself, and they have been trying to get men; I know they have been advertising for men.

Q. I didn't get that last.

A. I know they have been advertising for men.

On *re-direct examination* the following occurred:

Q. With regard to the agreements signed as you said between employers and the different unions, I understood you to say that they provided for the employment of union men.

A. Yes.

Q. Union help?

A. Yes.

Q. Do you know as to whether or not these agreements, assuming it was an agreement with the carpenters and the employers, whether those agreements provide that the employer shall employ all union help, or whether they merely provide that they shall employ union carpenters?

A. Union carpenters, that is all.

Q. In other words, the one member of the Building Trades Council entering into an agreement with the employer, looks after the men of that particular craft.

A. That is all.

Q. And doesn't concern himself——

A. No.

Q. ——about the others.

A. No.

On *re-cross examination* the following occurred:

Q. Well, will you say that union painters will work with non-union carpenters?

A. I wouldn't say they would or I wouldn't say they wouldn't.

Q. Well, don't you know they wouldn't? You have been the State organizer of this painting union for how many years?

A. A little over two years.

Q. And you have been a union man for how many years?

A. About fourteen years.

Q. And do you mean to say now that you don't know whether union painters will work with non-union carpenters or not in a union district?

. . . . . .

A. Well, I should say in a union district they would work with union carpenters; carpenters would work with union painters.

Q. And they would not work with non-union carpenters——

A. I have seen it.

Q. Yes, you have seen it; I am talking about the general rule now.

A. No, they should not.

Q. It is the backbone of the unions, isn't it?

A. What is that?

Q. The fact that they will not work with non-union men if they can possibly avoid it, put it that way?

A. If it was the backbone, Mr. Lane, we wouldn't need organizers or business agents.

Q. Well, it is what you are attempting to make the backbone then?

A. Yes.

Q. Put it that way, is that right?

A. That is right.

PLAINTIFF'S EVIDENCE (Continued).

Thereupon the defendants rested and to further support its case plaintiff offered in evidence the record in the case of New Jersey Painting Company vs. Local No. 26 in the Court of Chancery of New Jersey of the testimony of MR. ROBERT E. MACKAY commencing on page 64, from page 64 to page 66, and by stipulation the following statement was taken as a resume of that testimony:

> "Mr. Robert E. Mackay is the president of the New Jersey Painting Company, and also the president of the Robert E. Mackay, Inc., Robert E. Mackay, Inc., is a corporation of New York, which has been in the business of doing painting in New York and over the United States since 1905."

From the same testimony of Mr. Mackay the following was admitted without objection: he was presi-

dent and executive manager of New Jersey Painting Company and Robert E. Mackay, Inc.; both concerns have done business in different parts of the country; from Denver to New Orleans and all through the South and North; up to the adoption of the rule at Dallas, Texas, he did not know of any practice among painters in paying the local rate or foreign rate, whichever might be the higher; he did the Memorial—extension of the Memorial Hospital in Orange a short time before and he only paid the local rates; the condition of the painting business is keenly competitive and has always been that way; master painters, with respect to the rate they figure in getting contracts, can figure any rate they want, but, as an example, if a building is to be erected in Tacoma, Indiana, the George J. Fuller Company, a general contractor, will get figures from the local painters and, irrespective of what the figure of the master painter is, if Fuller Company want the master painter to do the job, it will offer him that work at the local price, and if he does not take it, he does not get it; the local price prevails, because that is how they get their general contract and they have got to hand it down the line to their sub-contractors; he is speaking of the local contract price, and that is based on the local rate as to labor in the town in which the work is to be erected.

Without objection the further testimony of Robert E. Mackay on *cross-examination* was admitted:

Q. Then you say in the month of October, 1921, you were informed by District Council of the Brotherhood of New York City that a new rule as to the application of higher wage had gone into effect?

A. They notified us that any New York concern going into a foreign territory would have to pay the higher rate of wage—in other words, they would have to pay the New York rate, but that the fifty-fifty propo-

sition had been cut out—done away with—that we could use all New York men or all local men.

Q. But the application of the higher wage, you were informed that that rule had been adopted some time prior to October, 1921, is that correct?

A. No, no.

Q. Well, you were informed in October, 1921, that the rule had been adopted?

A. At the convention held at Dallas, Texas.

Q. At about that time?

A. About—I think it was in October they held it.

By consent the entire examination of JOSEPH F. KELLEY, who was sworn for the defendant in New Jersey Painting Company as Local No. 26, including the direct and cross-examination, was admitted.

The witness said on *direct examination* that: he resides at Laurel Springs, New Jersey; he is a painter by trade; at the present time he is International officer, second general vice-president of the Brotherhood of Painters, Decorators and Paperhangers of America, one of the defendants in the action; he had been a member of the organization for eighteen years, and second general vice-president for thirteen years continuously, and by virtue of his office he is also a member of the general executive board of the Brotherhood, and has been such for thirteen years; his duties as member of the general executive board of the Brotherhood is to act as a director of the International organization which is chartered under the laws of the State of Indiana, and the general executive board passes upon grievances and disputes between members of the organization and between various locals and district councils, also adjust disputes or differences between the local organization and employers; he has attended mostly every

session of the executive board, which meets four times a year, and takes up the disputes between the men and the employers and various appeals and grievances that come up under the constitution of the Brotherhood; he has assigned to him numerous duties; he has a district where he has charge of all disputes between the members and the various local unions and the local unions and their employers; he is sometimes called on to adjust disputes with employers; sometimes arrange and make—carry out agreements with employers, and the different disputes that arise from time to time brought on by the membership in the various cities where local unions of the Brotherhood are located; in such district assigned to him he is the representative of the Brotherhood of Painters, Decorators & Paperhangers of America; his district at the present time takes in from Virginia to New York; that is, in other words, it takes in including the State of Virginia, West Virginia, the District of Columbia, Maryland, Delaware, Pennsylvania, New Jersey, New York and part of the Ohio Valley; he has been in charge of that district as representative of the Brotherhood ever since his encumbrance in office thirteen years ago; he had other districts at one time; his district one time also included the whole of the New England States, comprising Connecticut, Massachusetts, Maine, New Hampshire, Vermont and Rhode Island, but in recent years he has not covered it, because they have a man now, vice-president of the Brotherhood, who takes charge of that territory; he covered the entire territory in 1910 and 1911; he has attended every assembly that was held since 1905 of the Brotherhood up to the present time, and participated in the deliberations and resolutions of such assemblies as a delegate and as a vice-president; his experience as a member of the general executive board of the Brotherhood and its first vice-president, as a repre-

sentative of the brotherhood of the territory mentioned, and as a delegate of the general assembly has given him a complete familiarity with the organization and its condition and with the condition of the painting industry in the country, and with the relations of employers and workers in the different parts of the country, and with the general working conditions of the industry; the Brotherhood has approximately about a hundred thousand men divided into possibly 1250 local unions scattered through the United States and Canada, and Honolulu and Porto Rico; in the painting industry they distinguish between local concerns and national concerns; a local concern is one which confines its activities and work to a certain locality, for instance,

> "we would take a man in a small town—his work would be mostly confined to that city and its suburbs, but a contractor that we would consider nationally would be a man that would do work throughout the entire country, sometimes from coast to coast, and they would—they generally come from the very large cities";

he thinks if they have fifty national concerns that would be a great number; they would come principally from New York, Chicago, Boston, and a few isolated places —Cleveland, St. Louis, and here and there might be an employer of what would be considered national reputation that would go throughout the country, periodically.

Q. What percentage of all national concerns would you estimate to be comprised in New York, Chicago and Boston?

A. The question is, what I would consider of national reputation in those three cities?

Q. Yes, as compared with what is outside of these three cities?

A. Well, I would say that the bulk of the national men would come from those three cities.

Q. Can you make it somewhere more definite than saying the bulk? Would you say fifty per cent?

MR. LANE: I object to that.

Q. My question is, can you make your statement more definite than merely designating it as the bulk?

A. Well, I would say that over twenty-five per cent., I would venture to say, come from the three last cities.

Q. Over how many?

A. Twenty-five per cent.

Q. You mean twenty-five per cent. of the national concerns?

A. No. I would say—pardon me. You get me wrong. I would say that there would be about twenty-five of those would come from the cities of Chicago, Boston and New York.

Q. You mean twenty-five out of the possible fifty?

A. Yes, sir.

Q. And with respect to the volume of work done by such concerns outside of their home city what portion of it would you estimate as being done by the concerns of New York, Chicago and Boston?

A. What percentage of the work that they would do outside of the city where they are located?

Q. Perhaps the question is not quite clear, Mr. Kelley, I mean if you take the entire volume of work done by national concerns outside of the home cities what portion of that work is being done by such concerns coming from New York, Chicago and Boston?

A. In the whole country?

Q. Yes.

A. Well, of course, I would have to figure that. It is quite a proposition. It needs some thought on it to figure what percentage of the work they would do outside of their home city. I will answer it this way and

say that some contractors do a great deal more outside of their home cities than they do in.

Q. That is not my question, Mr. Kelley. I did not want you to compare the work done by such concerns outside of their home city with the work done by them in their home city, but what I wanted was, if you take the total outside work done by such national contractors or concerns how much of it would fall to the lot of New York, Chicago and Boston and how much of it would be done by other concerns such as you have mentioned in Cleveland or St. Louis?

A. Well, I figure that New York, Chicago and Boston concerns, on classes of work, they would do about twenty-five per cent. of it.

Q. And the other seventy-five per cent. by the St. Louis and Cleveland concerns?

A. Yes, sir.

Q. Do you get me?

A. And the local contractors.

Q. And the local contractors?

A. Yes, sir.

Q. Then you did not get my question. I am not considering local contractors. I am considering only the outside work done by these national concerns whom you described—only outside work—and I am asking you with respect to such outside work what portion approximately is being done by concerns in New York, Chicago and Boston, and what portion is done by the remaining concerns such as you mentioned, Cleveland and St. Louis?

A. Oh, well, I should say that those firms out of those large cities, where the work is on the outside, that they have the contract for, of at least seventy-five per cent. of the work. That is—now you get my answer on that—is where they go out from these cities, understand, and those of national character.

Q. Yes, sir.

A. See?

Q. Would you name the principal national concerns outside of New York, Chicago and Boston?

A. That is in those isolated places where I mentioned?

Q. Yes.

A. Well, we have one in Cleveland, we have another in St. Louis, we have another in Louisville—those are three of the principal ones outside of the cities that I mentioned.

Q. And do you think of any more outside of these three?

A. Well, we have one here in Jersey that does considerable work, I would place him in the national proposition.

Q. Who is that?

A. The firm of J. I. Hass of Jersey City. He is quite a large employer of men, and goes throughout this immediate vicinity, around these states.

Q. And can you think of any more outside of the concerns you have mentioned?

A. Oh, well, I would have to give time to that. There might be one in the City of Washington that goes around that town, but not of any importance. Just simply has considerable work between the District of Columbia and Baltimore and work around Maryland; and might be one in Pittsburgh that covers considerable work in the vicinity of Pittsburgh and the adjacent towns within fifty or a hundred miles, considered quite an employer of men, but not of national scope.

Q. And all the other concerns doing work on the national scale are centered in these cities you have mentioned?

MR. LANE: I object. It is a misconstruction of the witness' testimony. I object to the question in that form.

A. The answer to that is, that the majority of work is done by the employers I have mentioned.

Q. Mr. Kelley, what type or class of work is being done principally by these national concerns outside of their own home city?

A. Well, of course, I would divide it in two classes and say there is a class of employers out of the large cities that does a lot of decorations, such as churches, theatres, private residences and banks and lodge rooms; that is decorative work—and the other is class of work that might be termed commercial work, as in loft buildings, office buildings, manufacturing plants, and housing propositions, sometimes that large corporations have developed for housing their employees in a certain locality. That is what I would say that the work is divided up in.

Q. According to you then there are two classes of work for which these national concerns may be engaged outside of their own home city, one is work requiring more than average skill—decorative work?

A. Yes, sir.

Q. And the other large sized operations?

A. Yes, sir; large buildings; skyscrapers as we may term them and banks and corporations.

Q. In your experience are these national concerns ever called upon to do ordinary work of small size outside of their own home city?

A. Well, not often. Some of them do that in their home cities, what we call old work or alteration work, and in some cases they have renovations—renovate homes.

Q. In their own cities?

MR. LANE: I object.

A. In their own cities and out of town.

Q. And what class of contractors does the ordinary work distinguished neither by quality nor size in the smaller towns—who does that work ordinarily?

A. Distinguished by quality?

Q. Not distinguished either by quality or by size, just ordinary plain work in the smaller towns?

A. In the smaller towns they have small contractors that does small jobs, like alterations or perhaps new houses. Things like that generally goes to the local contractors. In the very small towns—of course in some towns they have got some fairly good size contractors. In towns of a hundred thousand or more they have got fairly good sized contractors in those towns and they generally do the bulk of the work in those cities.

Q. In the course of your negotiations with employers or efforts to adjust the dispute between employers and workers have you had occasion to learn what charges the national concerns make for work done by them outside of their city?

MR. LANE: I object upon the ground that it calls for a conclusion. It calls for information which cannot be within the knowledge of the witness except by hearsay, and something too indefinite and not the best evidence.

Q. Have you had occasion to familiarize yourself?

A. I don't know whether the object stops me from answering.

Q. Go ahead.

A. Well, I think that I could answer that. These men of national character, why, of course——

Q. Your first question, Mr. Kelley, is whether you have had opportunity to familiarize yourself with the prices charged?

A. Well, in a number of cases I have had by hearing the price of work and different things like that.

Q. From whom?

A. From contractors and from our men.

Q. From both employers and workers?

A. And our men. They have general knowledge that we have of work of that description.

Q. Will you state whether as a rule such national concerns charge more or less for work done outside of their home cities than for work done in their home city?

MR. LANE: Same objection, and on the further ground that it is wholly immaterial.

A. Invariably I would say that they charge more. I might explain that my reasons for that is that in mostly all instances they have to send their charge men and in a number of cases they have to send their material, their scaffolding and their appliances, and the men that they send generally have to get their board and their expenses, and that is where my knowledge would come in of those contracts being charged at a greater sum.

Q. Than for similar work done in the home cities of these contractors?

A. Yes, sir.

Q. Mr. Kelley, is the wage scale of the journeyman painter uniform throughout the country?

A. No.

Q. Does it vary?

A. It varies, yes, sir.

Q. In the various localities?

A. Yes, sir. The local organizations are permitted to make ther own wage scale.

Q. How much of a variance is there between the lowest and highest wage scale in your industry?

A. Well, I might say that those towns that are not organized and those that are only partially organized, why they have a low wage scale, and in the large cities, why the wage scale is generally fair and considerably higher than those localities where they have no semblance of organization.

Q. And the wage scale in each locality is fixed by agreements between employers and workers?

A. In mostly every case. Sometimes by co-operation—or an agreement with the employers and with the journeymen, and sometimes where there is no employers' association it is generally set by the journeymen and the employers go along with it.

Q. The employers accept it?

A. Yes, sir.

MR. LANE: He says, "go along with it."

Q. By "go along," Mr. Kelley, do you mean they accept it?

A. Yes, they accept it.

MR. LANE: Or yield to it.

THE WITNESS: Well, I might state in that case that in the smaller towns the employers are most all members of our organization, in those cases that I refer to.

Q. Mr. Kelley, Mr. Rosenthal has testified—(interrupted.)

MR. LANE: I object. That is not the proper way to put the question to the witness.

Q. Mr. Kelley, in the examination of Mr. Rosenthal as a witness in this case, the following question was asked of him and the following answer made by him. "Q. Do you know or did you know or do you know of any practice of contractors in the City of New York in estimating upon work in other cities figuring on the New York wage scale? A. No, sir; figure the local rates. Q. What wage scale is figured on? A. The wage scale at the point where the building is being erected." I will ask you whether this is the practice in the industry in your experience.

MR. LANE: The same objection.

A. I would say—as far as my knowledge is concerned I would say no.

Q. And on what basis within your experience does a New York national contractor within your definition figure for work to be done outside of New York?

MR. LANE: I object on the ground that the witness has not shown any experience to qualify him to answer.

A. Well, that question, I might answer it in this way, that in a great number of instances these national painting contractors generally furnish estimates to national builders, or builders of national reputation that come principally from the large cities, and their general system is to send—like if the general contractor was located in New York they perhaps would send out invitations or bids to maybe seven or eight contractors in the City of New York that are competent to bid on this class of work and in other instances they might send out outside and get perhaps one—one sometimes might be from the city where the job is located, or might be some other city in the country—that they perhaps would receive five or six bids from New York contractors and then perhaps they would take a bid of a local contractor or some other man coming from some other city, and sometimes that man would perhaps be one of those that would be, as I said, isolated, that does work throughout the country in different towns—(interrupted).

Q. My question, Mr. Kelley—(interrupted).

MR. LANE: I object to the interruption, let him finish.

Q. My question, Mr. Kelley, was whether in making such estimates the New York contractors bidding on an outside job figures on the New York scale or on

the local scale—of the locality in which the job is being done?

MR. LANE: I object to that question being repeated. The question was put before and the witness started—was saying he would answer it in this way, whereby counsel, not satisfied with his answer, interrupted.

Q. Have you my question?

A. Yes, sir. I would say that they estimate invariably on the home city work. They would take their basis for their estimate on their home city.

Q. Applying that to the case of the New York contractor taking work outside of New York the scale he would figure on would be which?

A. New York scale.

Q. With respect to the class of work which you designate as decorative work would the national concerns mentioned by you meet any competition in the local market?

A. Well, they might in some instances, and others why it would be nil.

Q. In the case where a particularly decorative painting job is to be done, say a church or theatre, in a smaller town, does such town as a rule have workers of sufficient qualifications to do the work?

A. No.

Q. It was also testified to on this trial that one of the reasons why national concerns, as you just defined them, were apt to get work outside of their own city was because they could underbid local contractors and do the work for less money. Is that the case within your experience?

A. Not in my experience.

Q. Will you state what in your experience are the principal inducements for general contractors to en-

gage national concerns to do work outside of their home cities?

A. Well, there are numerous reasons. Some of them—first, because of the organization that some of these national painting contractors have; another on account of the efficiency of the men, and another on account of their ability as skilled mechanics and in order that they will be able to turn out their building at a certain time which general contractors have to do in a number of instances, and they have and can have more harmony with the men employed on this kind of work on account of the organization that some of these large contractors have in handling this class of work.

Q. Are the most skilled and best qualified journeymen painters or decorators scattered evenly throughout the country or are they to be found in some particular center?

A. I would say they are to be found in large centers—in large cities.

Q. As for instance?

A. For instance in New York, Chicago, Boston, Cleveland, and on the coast I would say in Los Angeles and San Francisco. The cause of that is because of the volume of work of that character that requires the skill would be greater and the opportunity for them to make a livelihood would be greater in those cities, and the bulk of the skilled mechanics come from the larger cities.

Q. Mr. Kelley, prior to the convention of your Brotherhood held at Dallas, in September, 1921, was there any uniform rule within your Brotherhood regulating the wages of your men on outside jobs done by what you term national contractors?

A. There was a rule, but there wasn't anything definite at that time regarding the enforcement of any definite rule regarding wages.

Q. Was there any uniform practice with respect to such jobs as bearing upon the wages to be paid?

A. Well, there was a practice that had existed for years. I might say that in my opinion was the cause of this higher rate being enacted into a law in our constitution. The prevailing practice for years was that where an employer coming from a large city to do a job he offered—often made extra inducements to pay more than the scale, and that is done for various reasons. They would offer five—ten or perhaps pay the higher scale of wages of the city that they came from in a number of cases, and that went on for years prior to the enactment of that law and that was done again, in my opinion, for efficiency, and for the men—they wanted competent mechanics in order to finish the job —had to make some extra inducements in some places to take them from the local employers, or get men—men do not care about quitting their local men without there is some opportunity—and that was invariably the case for years. Men seek those jobs in the town where they pay the extra money.

Q. You have said, Mr. Kelley, that was the cause for the adoption of the rule by your convention, was that the only cause?

A. Well, not—that was not the only cause, but in my opinion that was one of the causes. There was a number of reasons that the membership had to give for that. That was one of them; and again our membership believed and to this day believes that these contracts are always estimated at the higher rate of wages, and they believe that they would get some of that work; and again on account of the friction and lack of harmony that would exist on a job there were two different and distinct wage scales paid. Didn't mean harmony. Didn't mean for organization; and again meant, by paying one wage; and the higher rate —it meant a just and equitable wage and those are the

reasons the men give from time to time for getting up this law.

Q. When you say this law, Mr. Kelley, you mean what law?

A. I mean the section of our constitution that says that higher rate of wages of either city shall be paid.

Q. Mr. Kelley, in undertaking an outside job, is it customary for the contractor to take some of his employees in his home city to such outside jobs?

A. Mostly every case, yes, sir.

Q. And prior to the enactment of the present constitutional provision of your Brotherhood what wages would the man so taken to the outside job be paid?

A. He would get the higher rate of wages. If he was leaving his home city and it was higher he would get that, and if it was going to a city where it was higher he would have to receive the higher rates of wages there.

Q. In a case where the job was undertaken by a national concern in New York to be executed say somewhere in New Jersey and some of the New York employees would be sent to said job, they would get the New York rate?

A. Yes, sir.

Q. And in such cases would the men coming from New York frequently work with local men on the same job?

A. Yes, sir.

Q. And prior to the enactment of this rule what wages would the local men get?

A. Well, as I said before, in a number of instances the employer coming in would offer them some inducements to work for, as I said, five or ten cents an hour more or make some extra inducements to them. In a few instances they might have worked for local conditions.

Q. Within your experiences as member of the general executive board and as the representative of the Brotherhood within your respective territory, did any friction ever come to your notice on account of the diversity of wages paid on the same job to men coming from one city or from the other?

A. Yes, sir.

Q. Or any disputes between workers and employers on that ground?

A. Yes, sir.

Q. Do you know of any strike having been called by such conditions?

A. I cannot just figure where—just now where there was any strike directly, but we have had lots of friction and it would lead us to strike if we were not to adjust them to the satisfaction of our men and the employer.

Q. Have you had many occasions to adjust such disputes?

A. Yes, sir.

Q. Arising out of the diversity of wages paid on such jobs?

A. Yes, sir; I have had some. I had one that I have in mind since the enactment of this law, in the City of Washington. We had a New York employer who was employing all of New York men and was not employing any local men. There was friction between those men and our men located—or belonging to our local union there, and they called attention to our laws relative to this matter, and I went on the job and saw the man in charge and he told me that the owner of this house did not want any local painters to work on this job. I said, "Well, that is peculiar," and he said that he wasn't going to put any Washington men on, and he wasn't going to pay any men, if he was forced to employ them, the wages. Of course, I assumed he was taking some authority and I came on to New York and

talked to the employer, and he told me that, "We know the law, Mr. Kelley, and we have always been friendly with your organization. We want to be and you can rest assured you need not bother any further. We will comply with your law and the men of Washington will be employed and we will pay them the New York rate of wages."

Q. That relates to the other branch of your rule, the proposition of employing at least fifty per cent. of the local men?

A. Yes, sir. And also the higher wage scale.

Q. And the higher wage. Now, I am asking you whether you ever, or your organization ever had complaints from employers on account of friction among the men due to the different wage scale paid on the same job?

A. Yes, sir. We have had. Quite recently. An employer from Louisville, Kentucky, complained about our men in Chattanooga, Tennessee, demanding the higher rate of wages, and I believe we had to send one of our organizers there to attempt to adjust the matter.

Q. Was that after the enactment of this rule?

A. That is less than a month ago.

Q. Now, Mr. Kelley, I am referring to the period before the enactment of the present rule and I am asking you while there was no uniform rule for the payment of the uniform wages to all men on the same job, did the employers ever complain of being hampered in their work by friction among the workmen?

A. Well, indirectly. We had cases at that time where we had to go and tell the people that our men—in those cities that they would have to work for the prevailing rate of wages of their home city.

Q. Did any interruptions in the work on account of such friction or disputes come to your notice before the enactment of the present rule?

A. Yes, sir. Men in those cities would not work on the job.

Q. Were you present at the convention of your organization at Dallas when this amendment to your constitution establishing a uniform rate of wages on outside jobs done partly by men from one locality and partly by men from another locality was discussed?

MR. LANE: I object on the ground that it is not a true statement of the rule.

A. I was present at the time when this matter was discussed by the delegates to our assembly.

Q. I refer to the rule which establishes the uniform wage and fixes it at the higher of the rate in the home cities, or in the locality of the work, as the case may be?

A. I was present when that was changed, or made more explicit.

Q. And did you hear the discussion on the subject?

A. Yes, sir.

Q. And were the grounds mentioned by you considered?

A. Yes, sir; some of the things that I advanced were advanced on the floor of the assembly. One in particular was the fact that in a number of instances the higher rate was estimated on and for that reason the delegates that were advocating the higher rate advanced that as their reason for this change in our constitution.

Q. Will you please summarize the reasons urged for the adoption of that amendment?

A. I did not get that question.

Q. I say, will you summarize briefly—state briefly the reasons which were advanced for the adoption of this amendment at your convention?

A. I thought I explained those early in the affair. Of course, I said that the reasons advanced were on

account of the members knowing and believing that all this work was estimated at the higher rate, and again for to keep down the friction that would exist where there were two scales of wages.

Q. On the same job?

A. On the same job, and by the same employer, which isn't—doesn't mean very much organization. So—and in order that the job would go along smoothly and efficiently because where there was friction it generally follows that the employer is not getting what belongs to him, so far as that is concerned, and in order that there should be a just and equitable wage, because in a number of instances the men were working alongside of men and doing, in instances, the same class of work, and they believed that they were justified in their contention of getting as much money as their fellow brothers coming from the other cities. All of those were things that were discussed.

Q. When was the amendment adopted, Mr. Kelley?

A. The amendment, as in its present form, was adopted at our Dallas convention.

Q. Which was held when?

A. In September, 1921.

Q. And after the adoption of that amendment was notice of it given to the employers?

A. I believe that the delegates after they left the convention notified their employers, and where there is a District Council they invariably notified their employers of the change. In some instances I have notified employers personally, and we have notified them through our office.

Q. What employers did you notify personally? Did you notify Mr. Mackay?

A. Well, I believe that Mr. Mackay was present at a conference or interview that we had at the Builders Exchange, I believe in the month of October, preceding our general assembly or following our general assem-

bly. I was there on other business and the question was asked by Mr. Rosenthal, "Do I understand, Mr. Kelley, that you changed the law relative to out of town work?" I said, "Yes, the law is now that you must pay the higher rate of wages," and I believe that Mr. Mackay was present at that time. And I think afterwards that Mr. Norman, who represents the Employers' Association, was also present, and he then repeated the question to me and I said yes.

Q. Mr. Kelley, is the firm of Robert E. Mackay, Jr., Incorporation, of New York, one of the national concerns described by you?

A. I would consider that that firm is a national concern.

Q. Mr. Kelley, Mr. Rosenthal stated on the witness stand that out of about fifty outside jobs which his firm, the Barker Painting Company, had undertaken after the passage of this rule, the rule was complied with in only one or two instances. Are you familiar with Mr. Rosenthal's work, or rather the work of the Barker Painting Company, after the passage of this rule?

A. Well, if there is fifty cases I don't know where they could be. I know the Barker Painting Company had quite some work prior to the enactment of that law that was not—that he did not pay the rate, but that was to my knowledge prior to it, and I can say one of those jobs was in Wilmington, Delaware, and another I believe was in Steubenville, Ohio; and I think that there was a job in Detroit; and all of those, I believe, were either before or they were contracted before the enactment of this law.

Q. Where a job was contracted before the enactment of your amendment did you permit the contractor to do that work upon the old basis?

A. If it was brought to my attention in the district I would advise the local union to allow the contractor to finish his work.

Q. On the old scale?

A. On the old scale, because they would say that that was taking an advantage and we would not care to have that because we have friendly relations with the employers throughout the country.

Q. Mr. Rosenthal mentioned the Statler Hotel in Buffalo as one of the jobs done by him on the basis of the Buffalo scale, recently. Do you know the situation with respect to that particular work?

A. Well, I just know something about it, and it is quite recent. At the same time that I had occasion to inform Mr. Rosenthal about the higher rate of wages he asked me if he got the hotel in the City of Buffalo would he have to pay the higher rate of wages. I said, "Yes, that is our law now, Mr. Rosenthal, and the higher rate of wages will prevail on that job." Now since the work has proceeded in that city, I understand that for reasons of our men in that locality being involved in a difficulty with their employers that they came to some understanding regarding wages on the Statler Hotel. I believe that our organizations there were inviting outside contractors on account of the strikes that they were having there to bid on this work, and I think that if any terms were made, it was made on that, but I believe that even that is higher than the Buffalo scale of wages.

CROSS-EXAMINATION.

By MR. LANE:

Q. Mr. Kelley, why would it be unfair to make the contractors pay the higher wage scale where the contract was taken before the new law went into effect?

A. Why?

Q. Yes; why?

A. Well, we considered that it would be unfair to take advantage of him when they were using that wage scale in those localities before. Understand, we did not want to have him tell us that we were taking any undue advantage of him.

Q. But why?

A. Why?

Q. You heard my question. Why was it taking an unfair advantage and why could he say it was taking an unfair advantage?

A. Well, employers would say that we were taking an unfair advantage of them.

Q. Why?

A. Because of the fact that we had not up to that time enforced the law relative to fifty—or relative to the higher rate of wages.

Q. What difference would that make so far as fairness is concerned?

A. Well, it would——

Q. Why?

A. I explained——

Q. I know it would, but why would it?

A. I explained the reason about it.

Q. Is that the only explanation you can give?

A. That is the explanation that I give.

Q. But the contractor figured on the higher rates when he got the contract?

A. Yes, sir.

Q. Then where is the unfairness?

A. Yes, sir.

Q. Where is the unfairness?

A. Well, I considered in adjusting this that in order to have the harmony, where there was a question regarding the wages, understand I would consider, while I was never asked, understand, but I said if I was asked that in order—(interrupted).

Q. The word fair is not my word, it is yours. You said it would be considered unfair to apply the higher wage scale where the contract was taken before, and I am asking you why it would be considered unfair if the contractor had figured upon the higher wage scale?

A. Well, I give you my explanation of it.

Q. Is that the only explanation you can give?

A. Yes, sir.

Q. How do you know that the contractor figured on that higher wage scale?

A. That is in common practice. The men—employers that contract work—it is only possible for them to contract at the higher price because they do not know in all instances what the local scale is.

Q. They do not know in all instances what the local scale is?

A. No.

Q. Why the local scale is promulgated in the printed list, isn't it?

A. No.

Q. There are no printed lists?

A. No.

Q. Employers' Association in New York hasn't a printed list of the wage scale throughout the country?

A. I can only say from the journeymen, and the journeymen are the ones generally that make the wage scale.

Q. The Employers' Association of New York have not a printed list showing the wage scale in every city there is in this country?

A. If the employers have one it is computed by themselves and not by the journeymen.

Q. Well, suppose it is computed by themselves or by the journeymen?

A. And it cannot be exact because we do not know from time to time what the wage scales are in the various localities of the country ourselves.

Q. Don't you know that the employers get that information for their own use?

A. They can get it for their own use from their own members, that is true, but invariably, in a number of localities, they do not employ our men.

Q. Well, I am talking about where your men are employed. Now they do get it, don't they?

A. They can get it in some instances.

Q. And don't they get it?

A. They can, I say, in some instances.

Q. Do you know whether they do or not?

A. Well, if you say they have gotten it, I guess it is true they have got it.

Q. Do you know? I am trying to get your information. You are here as an expert upon employers' contracting prices?

A. I don't know, because they wouldn't tell me if they were furnishing those lists.

Q. And they wouldn't tell you whether they were estimating on the higher wage scale or lower wage scale, would they?

A. Well, all the information I have doesn't——

Q. What is your information? The difficulty is I don't know what you testified to as being your information. What information have you?

A. I gave you the information that the general practice of these contractors, when they send out their work for estimates on, that these contractors generally estimate for the higher rate, for that is the reason we have contractors in this and other cities that do estimate on this same class of work and do pay the higher rate of wages, and in competition.

Q. I am asking you—you have told me now several times that that is the practice of the employer—and I am asking you how you know it to be their practice?

A. I know it from the information that I have from our men and from the employers.

Q. Well, from whom of the employers, now?

A. Well, we can take the employers—some that do pay the higher rate of wages.

Q. Now, I am talking——

A. In common practice?

Q. Why of course the common practice now, if your law is to be obeyed, must be that they will estimate upon higher wage scales. I am talking about the practice of the contractors before the changed law was put into effect.

A. Well, it was optionable with them then.

Q. And you don't know whether they figured upon the higher or lower wage scale?

A. I gave my evidence that they must have figured or they couldn't have paid five and ten cents an hour more. That was proof——

Q. Did they pay five and ten cents more on every job?

A. In most of the cases that I have knowledge of.

Q. How many jobs do you have knowledge of?

A. Well, I have had considerable. I even worked on some of these jobs myself where they paid the higher rate of wages before it was enacted into a law in our organization.

Q. Some of them did not pay the higher rate, did they?

A. Some few instances.

Q. When they did pay the higher rate they must have figured on the lower rate?

A. Well, I doubt that, too.

Q. Do you know anything about it?

A. I know from general practice that they all estimate—they have to have some basis to estimate on, understand, and they generally take the wages, that they are paying those men, their own men, in those localities.

Q. I understand that—what you say, I am asking you how you know?

A. I say from general knowledge in the business, dealing with these employers.

Q. You have given me now all the ways by which you know?

A. Yes, sir.

Q. There is nothing else that you can think of that would give you that information?

A. I am not thinking just now, I am testifying.

Q. You are thinking. Is there anything else you can think of now on the stand that would give you any information upon the subject as to how the employers figured?

A. Well, I told you that.

Q. Anything else?

A. No.

Q. There are two distinct classes of work in the painting business in general, one is decoration and the other is common painting, isn't there?

A. Yes, sir.

Q. Now decorators get higher rates than ordinary painters, don't they?

A. Not necessarily. Our scale is just the same. We have decorative work——

Q. You mean to say the man who paints the ordinary wall, such as we have on this wall, gets the same amount—the same wage as the man who does interior decoration for theatres?

A. Yes, sir.

Q. Of a decorative character?

A. Yes, sir.

Q. What theory is that on?

A. Well, that is on the same theory that I have advanced my argument, understand, to have the harmony prevailing on the job.

Q. Between the highly skilled artist and the unskilled painter?

A. Our organization says that the minimum scale will be so and so. If the employer cares to pay more that is optionable with him but there is nothing in our

law that says anything but the higher rate of wages—or the rate of wages that we ask for the plain painter and for the decorator also.

Q. I am not talking about your law. I am talking about the practice now?

A. The practice is the same.

Q. In other words, the highly skilled man who does the decorative work receives the same wage as the man who simply uses a brush?

A. Yes, sir; in the large cities, yes, sir.

Q. In the smaller cities?

A. Small cities, why they, perhaps might get a few cents more in a day. They would apply it to the most ordinary painting, extra compensation for taking charge, and what the employer would call efficiency.

Q. I am trying to draw a distinction now, between the ordinary painter who does flat work and the man who does decoration. That is the only distinction I am trying to draw.

A. We do not draw it any more in regard to making the wage scale.

Q. And there isn't any difference drawn in practice?

A. In practice, no more in large cities.

Q. Smaller cities I am talking about?

A. In the smaller cities it is optional with the employer. Where we have an agreement we have one wage scale for the painters.

Q. Does the employer in smaller cities usually pay higher rates for these artists?

A. If he has imported them in he does.

Q. That is a class of labor that has got to be imported, hasn't it?

A. Not necessarily.

Q. I didn't say necessarily. Isn't that the class of labor that they import?

A. It usually does. It usually comes with the contractor bringing them in—rare instances they might import a fellow in, but very rare.

Q. So it is usual to use local labor?

A. If it is a local contractor.

Q. I am talking about any contractor who is doing the work now. Suppose a national contractor does the work?

A. Yes, sir.

Q. For his ordinary work he uses local men, doesn't he?

A. He uses local and his own men coming in, both classes.

Q. Now he usually uses local men if there are local men enough in the locality, does he not?

A. Not necessarily.

Q. For plain work?

A. I may answer you just to show you—Mr. Rosenthal told me—and I don't know if Mr. Mackay was present, he says, "Kelley, if I could take the class of men that I got in my organization in New York I could make money with them on the higher rate of wages any place I sent them to in this country," to show you that he would take his own men, and he objected strenuously to us on account of the fifty per cent. law. He wanted to bring his men all over the country from his home city.

Q. I am not interested in what Mr. Rosenthal told you.

A. I am just telling you to point out my question—answer.

Q. (Question read.)

A. I said they would use them, yes, but he also brings his own men in.

Q. For plain work?

A. Yes, sir.

Q. In every instance?

A. Not in every instance.

Q. The most instances?

A. He sends some of his own men in almost all instances.

Q. They are charge men, aren't they?

A. Charge men.

Q. Foremen?

A. So called; but they bring them in for other reasons. I would call them for—sometimes they are second cads and third cads where there is a large job, and they generally are to assist in making a paste to show the local men how the work is done. How their organization does it. I mean, speaking of their "organization," the firm's organization of men. They are generally brought in, sometimes on account of their speed in their home city.

Q. Do you know of any reason why if the New York contractors or the national contractor employs all local men the local rate should not be paid?

A. Do I know any reason where a national contractor pays a local rate or——

Q. No. Do you know of any reason why a national contractor who employs all local men that the local rates should not be paid—why the local rates should not be paid?

A. For the reasons that I have given in saying why this amendment was enacted into our law. I testified to it.

Q. It cannot be for all of them because I have eliminated the friction. I am assuming that the national contractor employs all local men. What is the reason why he should pay the home rate?

A. Well, for the reason that has been advanced, as I testified to, because of the fact that he generally estimates to pay it and on account of the efficiency that he can get by these local men on the job by the advance in the price.

Q. Well, so far as the efficiency which he gets is concerned he may pay the higher rate. He will have accomplished that if he pays the higher rate at his option, will he not?

A. And you know that an employer coming from one city to another to do a temporary job of work would have considerable trouble getting men if he did not adopt the higher rate of wages because the men would not care to go to work there. Some of them, perhaps, if it occurred in the busy season, they would not care to leave their old employers, and secondly he could not get an efficient force without he made some inducement to them.

Q. I am very glad you are solicitous about the affairs of the employer.

A. We are, because it is mutual.

Q. I am not talking now from the standpoint of the employer at all. I want to know if there is any reason from the standpoint of the employee why, if the national contractor employs only local men, the rate of pay in the town from which the contractor happens to hail should be applied?

A. Well, I answered that.

Q. No, you haven't.

A. I said for the reason that in my opinion that his bid is on the higher rate of wages.

Q. That is the only reason?

A. Well, that and the efficiency that would occur on that job and the time of getting his work finished.

Q. Why do the large contracting firms send out to other cities and to the local city in which the work is being done to get estimates?

A. Sometimes they do not send to the city where the work is being done.

Q. You have stated in some instances they do?

A. In cases, yes, sir.

Q. Now, why?

A. Well, in the case where he would send it to the local—he would like to use that bid in my estimation to get an adjustment of the bid that was sent it by an employer——

Q. And does he use it?

A. Does he use it?

Q. Yes; in your opinion?

A. He—the general contractor—might use it as a cudgel.

Q. And if the national contractor desires—painting contractor desires to get the job from the general contractor what does he do in response to the cudgeling?

A. Well, that isn't the case if the fellow generally holds in his bid and he knows that he has got the organization. He is not going to take any chances in giving the bid to a local contractor, taking into account a man that never done any work for him before—whether he could accomplish it or not.

Q. Was the fifty-fifty rule adopted at the same time as the rule providing for the higher scale?

A. At the same time the fifty-fifty rule was discarded.

Q. Was discarded?

A. Yes, sir.

Q. What is the rule now?

A. The rule now is fifty-fifty. The constitution has been amended in a referendum for placing the fifty-fifty back.

Q. When was that?

A. Last July.

Q. 1922?

A. Yes, sir.

Q. So that as your constitution now stands it is absolutely impossible for a contractor coming from across the river in New York to perform a bid for work in Jersey City upon the Jersey City rate of wages?

A. Jersey City rate and New York rate are the same.

Q. Well, Newark, then?

A. Newark. If it is a New York contractor he would have to pay the New York rate of wages.

Q. And there is no way by which he can, either by bringing in his own men or employing all local help, by which he can escape that?

A. So far as using our men are concerned there is no way.

Q. You are pretty well organized in this city?

A. I think we are.

Q. Most a hundred per cent., aren't you?

A. No; I wouldn't say a hundred per cent.

Q. About ninety-seven per cent?

A. I would say we are about ninety-five per cent. organized in this city.

Q. That is, in Newark?

A. Yes, sir.

Q. And the same percentage in the Metropolitan district of the City of New York?

A. I would say that we were about ninety per cent.

Q. And in the State of New Jersey?

A. Ninety per cent.

Q. About ninety per cent?

A. I would say that, yes, sir.

Q. And the State of Pennsylvania?

A. Well, I would say we are about seventy per cent.

Q. And Connecticut?

A. Connecticut I would say that we were about eighty.

Q. And in New York outside of the Metropolitan district?

A. We would say that we were ninety per cent.

Q. Do you know the firm of Edward W. Minte of Washington?

A. Yes, sir.

Q. Is that firm a national firm?

A. So far I wouldn't consider it a national firm. They do considerable work outside of the City of Washington.

Q. What?

A. They go, as I said in my general testimony—I said that there were firms that does work in their immediate vicinity of their home city, and sometimes go out. I should say that Minte is considered quite a large employer in the City of Washington. He does work as I mentioned, and I had him in mind when I said he does work in Maryland and sometimes goes into Virginia and North Carolina.

Q. He is not a national contractor?

A. Well, I wouldn't place him in the fifty that I mentioned, but he is quite a large contractor.

Q. Do you know what the wage scale is in Miami?

A. I believe in Miami the wage scale is there at the present time $7 a day. We have a little difficulty with our employers in Miami.

Q. What is the Washington wage scale?

A. The present wage scale $8 a day. I would say we are having a little bit of difficulty there at the present time. We have an organization campaign.

Q. So that if Minte does work, although he is not one of the national contractors you refer to—if he does work in Miami he has got to pay the Washington wage scale, doesn't he?

A. Yes, sir.

Q. Do you know that he is doing work in Miami?

A. Just from your information just now.

Q. Well, do you base, or have you based your testimony with respect to your knowledge as to what the employers charge and estimate upon so uncertain a basis as you are willing to accept my statement or suggestion that Mr. Minte is doing some work in Miami?

MR. HILLQUIT: I object to the question particularly on the ground that counsel characterizes his own statement as an unreliable basis for testimony.

A. I have given my testimony from knowledge that I have from these things I have testified to.

Q. Apparently you were willing to base your knowledge upon an offhand statement made by me on cross-examination?

A. I told you then—I thought that it would qualify my testimony, that Mr. Minte has jobs in various localities in the South and in the immediate vicinity that I gave, and if he has got a job in Miami, why, he would have to pay the prevailing rate of wages for the City of Washington.

Q. Are there large firms in Philadelphia?

A. Oh, a few.

Q. What is the wage scale in Philadelphia?

A. Today, ninety cents an hour.

Q. What does that mean in a day's pay?

A. That means about—I guess $7.20.

Q. What is the wage scale in New York City?

A. New York, $9.

Q. Do New York contractors do work in Philadelphia?

A. Yes, sir.

Q. So that although there are contractors in Philadelphia, large ones——

A. Fairly large.

Q. ——who can do the work according to the local wage scale——

A. Yes, sir.

Q. ——a contractor from New York coming down to Philadelphia has got to pay the wage scale of New York?

A. Yes, sir.

Q. In direct competition with the local man?

A. Yes, sir.

Q. Although the local man—although there are firms in that city who are of national reputation?

A. Of course, we cannot say they all come in competition.

Q. I didn't ask you that, particularly.

A. We can't say whether they all come in competition. I will say—with a job like Stotesbury's house there I would say I don't believe any estimating on that job by any New York firm that he would come in competition with the Philadelphia firm, in my opinion.

Q. What is the wage scale in Boston?

A. Boston, $8 a day.

Q. Do New York contractors do work in Boston?

A. Yes, sir.

Q. And so that in Boston, although in competition with the local firms who are of national reputation also, they have got to pay the New York wage, too?

A. Yes, sir.

Q. Are there any firms of national reputation that you know in the City of Newark?

A. Not that I know of. There might be one or two firms that would go out and take a job in the smaller towns in New Jersey, and might go into Pennsylvania, and sometimes go into New York State.

Q. What wages do J. I. Hass & Company pay?

A. J. I. Hass pay $9 a day.

Q. By agrement or by——

A. By agreement.

Q. Separate agreement?

A. Separate agreement generally with New Jersey.

Q. The J. I. Hass Company doing work in the City of Newark, what would they pay?

A. They would pay $9 a day.

Q. Do you know of any jobs where they paid that?

A. I have one job in mind that Mr. J. I. Hass is doing at Atlantic City in New Jersey and is paying the

higher rate of wages. The Atlantic City rate is $8 a day and Mr. J. I. Hass is now paying on the High School at Atlantic City $9 a day and forty hours a week.

Q. Upon the theory that Jersey City is a part of the Metropolitan district?

A. No; on the theory that it is our law, and Mr. Hass employes all union men and lives up to the union agreement and the laws of the Brotherhood.

Q. How does your law affect him?

A. It affects him in this way, that when he leaves his home town the higher rate of wages goes with him. In other words, if he takes his men into Atlantic City, which is $8 a day, and the Jersey City rate is $9 a day, he pays the $9 a day.

Q. All in the same State?

A. All in the same State.

Q. You have agreements, have you not, between the employers and employees throughout the country?

A. Yes, sir; in most instances.

Q. Fixing the wage scale?

A. The local unions made the agreement with the employer fixing the wage scale.

Q. Those agreements are open to employers in other districts, aren't they?

A. Yes, sir.

Q. You say in some instances the employers are members of your association?

A. Yes, sir.

Q. Where?

A. Well, the City of Logansport, Indiana, I say that eighty per cent. of the employers in that city belongs to our local organization.

Q. How large a city is it?

A. I judge it has a population of about thirty to thirty-three thousand.

Q. Any other places?

A. Well, that goes in most—the smaller cities—we have quite a number of employers that belong to our organization, and I will state in Dubois, Pennsylvania, all the employers belong to our local organization, participate in its affairs. Any number of instances, too numerous to give them all, because we have twelve hundred and some odd local unions.

Q. And in most of the large centers there are employers' associations?

A. Yes, sir.

Q. On the one hand and your union on the other?

A. Yes, sir.

Q. In New York there is an employers' association?

A. Yes, sir.

Q. And how well are the employers organized, do you know?

A. Well, I don't know just how strong they are organized. Some time ago they did not have a very strong organization in the City of New York. Of course, perhaps now they are getting some more members in. I don't know just their relative strength at the present time.

Q. And your strength I suppose where you have agreements with the employers' association is added to that of the employers' association, isn't it?

A. Well, in what way?

Q. You are both working for a common purpose?

A. We have worked mutually—mutual interest of both of us, where we have agreements.

Q. Any employers' associations in the other large centers?

A. No—in a number of them, yes, in the large centers, yes, such as Chicago, Boston, New York and Philadelphia, Washington, they have employers' associations. Those cities we do not have any of our men—any employers in our organization.

Q. You have an agreement with the employers' association as such?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By MR. HILLQUIT:

Q. Mr. Kelley, what is approximately the percentage of all organized painters in the United States?

A. I would say approximately a little over fifty per cent.

Q. Mr. Lane has asked whether there was any way for a New York employer to get work done in Newark unless he pays the New York scale. Your answer was no. I will now ask you whether there is any way for any employer, dealing with your union, to get work done unless he pays the scale and accepts the other terms of union conditions?

A. In Newark, you mean?

Q. Anywhere; can any employer get the work of your members unless he pays the scale?

A. Nobody can unless he pays the prevailing scale of wages and abides by that law.

RE-CROSS-EXAMINATION.

Q. The rule that you have referred to as the law has, in your opinion, the force of law, hasn't it?

A. No; I only say so far as our membership is concerned, like all organized bodies, and we are chartered under the State of Indiana, that we are amenable to the laws of Indiana, that that is only something to govern our organization. We say it is an enaction that they make themselves and it is made by the membership either in convention or in referendum vote.

Q. Well, you say only so far as your members are concerned?

A. Yes, sir.

Q. Wait. You don't know what I am going to say. Has it the force of law for all practical purposes where your membership consists of ninety-three per cent. of all the employees engaged in the business—it has the force of law for all employers, hasn't it?

MR. HILLQUIT: I object.

Q. In your opinion?

MR. HILLQUIT: I object to that as calling for the witness's conclusion and being a discussion rather than an examination.

A. I say that that law or constitution only applies to the members.

Q. Yes?

A. Where it comes into the employer he generally has something to do with making the wage scales in the various localities.

Q. Never mind what has to do with making the wage scale. For practical purposes the wage scales ordained by the union and the law of the union, where the industry is ninety-three per cent. organized—I say for practical purposes that is the law for the employer and the employees, isn't it?

A. That is if he agrees to it.

Q. If he does not agree to it, he doesn't get his work done, does he?

A. I wouldn't say——

Q. You wouldn't?

A. I wouldn't say he couldn't.

Q. Will your men work with non-union men?

A. Our members will not.

Q. Will your members work with non-union workers?

A. Our members will not work in that case, where there is ninety-three per cent. of them organized.

Q. Would your members work with non-union men in cases where you are ninety-three per cent. organized?

A. I do not think so.

Q. You know they will not, don't you?

A. You are answering your own question. I say I do not think so. We have any number of cases where we have men violate our law even in the ninety-nine per cent. organized towns, and the men went to work.

Q. If they do they are violating your law?

A. They are violating the constitution and by-laws.

Q. If they work with non-union members?

A. Yes, sir.

Q. And your men will not work upon a painting job where there are other non-union men employed upon other parts of the work, will they?

A. I won't say that.

Q. Well, will your men work alongside of—on a painting job performed by non-union carpenters where you are ninety-three per cent. organized?

A. We might.

Q. Do you as a general rule?

A. Well, it all depends whether we are in affiliation with them.

Q. Are you in affiliation with the carpenters?

A. In some instances we are, not in all instances.

Q. In the Metropolitan district?

A. Not at the present time.

Q. Are you affiliated with any other of the building trades in the industry?

A. Not at the present time, not in New York.

Q. Not at the present time?

A. No.

Q. How long since?

A. The last three years.

Q. Are you still affiliated with the American Federation of Labor?

A. By all means, yes, sir.

Q. The painters, I suppose, have never gone out on sympathetic strikes?

A. I wouldn't say that. They perhaps assist the other trades in sympathy lots of times, I guess.

Q. In the Metropolitan district?

A. Some years ago, yes, sir.

Q. You say that you were organized and chartered under the laws of Indiana. Are you incorporated under them?

A. Yes, sir.

Q. When?

A. I will tell you if I can refer to our constitution.

Q. Go ahead.

A. December 7, 1894. What is on the constitution is right. Our office is at Lafayette, Indiana.

RE-DIRECT EXAMINATION.

Q. Mr. Kelley, are the members of your organization citizens of the United States?

A. I would say that the vast majority of them are.

Q. And are they all free men?

A. Absolutely.

Q. And claim the right to give their labor upon such terms as they consider just and proper?

A. Yes, sir.

Q. Mr. Kelley, Mr. Mackay stated on the witness stand here that his reason why he incorporated the New Jersey Painting Company was to avoid strikes. In your experience where disputes arise between employers and workers in your industry would the fact of such a corporation in any way tend to protect Mr. Mackay from strikes?

A. I do not think so. If our men had cause to lay down their tools they would lay down their tools on an incorporated body just as well as they would on any other, as there is lots of incorporated painting concerns that we work for and they are not relieved of strikes if the men——

RE-CROSS-EXAMINATION.

Q. I do not suppose that you mean that your membership claim the right in unionism to decline to work or to strike as they saw fit without regard to any other circumstances except their own will, or do you claim that?

A. I want to say that we have the right to decline work for whoever we saw fit, but as law-abiding citizens we obey the laws of every State in the union.

RE-DIRECT EXAMINATION.

Q. Is there any law that could compel you to work against your will?

MR. LANE: I object.

A. I have no knowledge of any law.

Thereupon plaintiff rested and defendants, further to support their case, offered the testimony of Philip Zausner, on pages 134, 135, 136 and 137 in the record of the New Jersey Painting Company versus the Local 26.

(The testimony referred to follows):

DEFENDANTS' EVIDENCE (Continued).

PHILIP ZAUSNER, on *direct examination* said: he lives at 60 East 102nd Street, City of New York, and is a painter by trade and is now occupied as secretary of the New York District Council of the Brotherhood of Painters, Decorators & Paperhangers of America; he was a delegate to the convention of the Brotherhood held in Dallas, Texas; one of the rules of the District Council requires the shop steward, that is, the union men in charge of the union interests on the jobs, to file weekly statements with the Council showing the number

of men employed and wages paid on the job; such reports are being made in writing, hand written and signed by each individual member on such jobs, received by mail at the office, tabulated in a regular weekly minute book, which is printed, and only one copy on exhibition for the membership and at the office of the District Council; this copy is in his possession as secretary of the District Council; he has gone over that book from April 1922 to January 1923, and has compiled all the wages received by their members working on outside jobs for New York City contractors; he has in addition to that also compiled a list of those not members of their jurisdiction working on outside jobs—local men—receiving the New York rate;

Over objection on the ground that the list was pure hearsay and immaterial and irrelevant, it was admitted in evidence as D-18.

On *cross-examination* the witness said: the list does not contain the names of the men who are working for the Barker Company at some hotel in Buffalo because it was not reported; there may be others where the men are not receiving the higher rates who have not been reported; if there are they are violators; the list is a list of those reported—of those who are obeying the law and those who are disobeying the law he assumes have not reported;

On *re-direct examination* he said: from his knowledge derived from his past dealing with employers he would state that the rule as to the higher scale is generally observed by contractors in New York and has been for many years back, as he remembers;

On *re-cross-examination,* he said: he knows the Barker Painting Company; he does not remember it built a hotel down in Wilmington or some work down in Wilmington just before the enactment of this rule in

which it did not pay the higher rate; he did not know until the Brotherhood representative, Mr. Kelley, testified to it that Barker Painting Company is now building or within a very few months—since the adoption of the rule—been building a hotel in Buffalo and not paying the New York rate; there may be others.

Q. And if the Barker Contracting Company paid in Wilmington—or painting company, paid in Wilmington, Delaware, the local Wilmington rates before the enactment of this rule your statement that the contractors all followed out this plan before the enactment of the rule is not quite correct, is it?

A. It is correct in so far as I have qualified, that all do excepting those who violate.

RE-DIRECT EXAMINATION.

Q. As far as you know there may be also contractors who pay below the scale?

A. As far as I know there may be some contractors who not alone pay under the scale but also violate working hours and every other provision of the union conditions.

Q. Did your District Council give notice to all contractors within your territory of the enactment of this amendment?

A. We did.

PLAINTIFF'S EXHIBITS.

Plaintiff's Exhibit P-1, offered during the examination of Rosenthal, is a contract dated November 8, 1924, between Barker Painting Company and John Lowry, Jr., Inc., under the terms of which Barker Painting Company agrees to perform all labor and material necessary to the completion of the painting for the Somerset Hospital, Somerville, New Jersey, in accordance with plans, specifications and addenda of Crow, Lewis & Wick, Architects, for the sum of $7800. The work is to be performed as required by the progress of the job, John Lowry, Jr., Inc., agreeing from time to time, upon request, to inform Barker Painting Company of such progress and the immediate requirements. The contract provides that Barker Painting Company will employ labor that will not involve John Lowry, Jr., Inc., in any dispute with any labor unions, and that no employee or employees unsatisfactory to John Lowry, Jr., Inc., will be employed in any branch of the work included in the contract.

Plaintiff's Exhibit P-2. Extracts from Constitution of International Brotherhood of Painters, Decorators and Paperhangers of America.

PREAMBLE.

In this age of progress and civilization the universal tendency is toward organization and combination. The capitalists, combined and consolidated, control the wealth of the world, and the rapid concentration of industry and power in their hands has an extremely injurious effect upon all branches of honorable toil. None have suffered to a greater degree than those engaged in the various branches of the painting industry.

Year by wear our craft has been reduced from its rightful position among the mechanical callings. Our wages are lower than in other trades requiring no greater skill or effort. In the absence of a strict apprenticeship system, and through lack of thorough organization, our trade literally swarms with unskilled men. Unfair and unscrupulous employers have introduced illegitimate practices that are a discredit and a reproach, while everywhere, in the competition for work, cheapness has become the prevalent rule to the detriment of employers and journeymen to the injury of the public and to the ruin and degradation of our trade. This condition of affairs demands our most earnest attention.

Shall we permit our craft to sink lower and lower, until we are beyond hope of redemption?

Are we not entitled to a just equivalent, a fair remuneration for our labor, sufficient to enable our families to live in modest comfort, to give our children a liberal education and permit us to make provision for sickness and old age?

It is evident that to protect ourselves we must combine. There is no hope for us except in unity and organization. We must form a union broad enough to embrace every competent worker at the various branches of our trade—one that will protect every man in his labor and his wages. Singlehanded we can do nothing, but united there is no power we may not openly defy.

Therefore, it is the imperative duty of every man who works for a living at our craft to do all in his power to secure thorough organization and unity of action. To accomplish the objects set forth in this Constitution we have formed the BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA.

ARTICLES OF ASSOCIATION.

Seventh—Constitution and By-Laws.

This Association shall have the power and reserves the right to make, establish and adopt such constitution, rules and by-laws as it may deem proper to alter, amend, add to or repeal the same at any biennial meeting of the local unions or by referendum vote. This Association shall have power in said constitution and by-laws to define the duties and powers of all its officers, and to regulate and prescribe the manner in which revenue shall be raised and local unions of this Association organized, officered and conducted, and to prescribe the amount of fees that shall be charged for admission to membership and as dues.

CONSTITUTION.

Name and Jurisdiction.

Section 1. This Association shall be known as the Brotherhood of Painters, Decorators and Paperhangers of America, and shall have jurisdiction over all house, sign, pictorial, coach, car, automobile, carriage, air craft, machinery, ship and railroad equipment painters; over all decorators, paperhangers, hard wood finishers, grainers, glaziers, varnishers, enamelers, gilders and scenic artists; over all men engaged in applying or removing paints, oils, varnishes, water colors, wall papers or other materials used in the various branches of the trade and over all glass workers, to wit: settlers of art glass, prism glass, leaded glass and protection glass, bevellers, cutters, glaziers, in lead or other metals, shade workers, silverers, scratch polishers, embossers, engravers, designers, painters on glass, chippers, mosaic workers, benders, cementers, flat glass or wheel cutters and other workers in glass used in the

construction of buildings or for architectural or decorative purposes, and shall be comprised of an unlimited number of local unions, district councils and other subordinate bodies, subject to its laws and usages.

Admission of Contractors.

Sec. 93. A contractor is one who takes work direct from the owner, architect, or builder, and employs one or more men.

Sec. 94. The admission of contractors to membership or the refusal thereof shall be determined by the by-laws of the local union or district council. Where contractors are admitted the local union shall determine the conditions of admission, but they must comply with the trade rules and working conditions of the locality in which the work is done; must pay the union scale, hire union men only and not belong to any employers' or contractors' associations. No contractor shall be eligible to hold office or vote on any question pertaining to hours or wages or at elections of Business Agent.

Privileges and Duties of Members.

Sec. 126. Any member who becomes a contractor or employer may (subject to the provisions of Sec. 94) remain a member in a local union which admits contractors to membership, but must resign, transfer to a local union that admits contractors to membership or take a withdrawal card from any local union whose by-laws prohibit admission of contractors. This law shall not interfere with the right of journeymen to take work temporarily during strikes, or lockouts, or when unemployed under such reasonable restrictions as the local union or district council may determine and to give employment to one or more men.

Sec. 127. When a member of the Brotherhood is employed by a general building contractor or owner, and the owner or contractor furnishes the material and the member hires union men by the day and pays union wages, it shall not be considered piece work. But if the work is taken from an employing painting contractor, it shall be considered piece work or sub-contracting and shall not be permitted.

Paperhangers working by the piece shall not be considered contractors.

Sec. 130. A member of the Brotherhood in good standing may work as a journeyman at any of the branches of the trade, provided he demands and receives the rate of wages paid and otherwise conforms to the working rules of that branch of the trade in which he wishes to be employed. He shall transfer his membership to the local union of the special branch of the trade in which he is engaged in a locality where such a union exists.

Sec. 132. Neither the General Executive Board nor any other authority shall have power to grant exclusive or special privileges to any local union or district council working under a charter of this Brotherhood; nor shall the G. E. B. or any other authority be invested with power to force any employer to bring men from one city to work in another city if union men can be procured in such city where the work is to be erected and finished. All conditions of such localities shall be strictly adhered to, the shorter work day and the higher scale of either locality to prevail in all cases. A card fully paid up, regardless of where it is issued, shall entitle the holder to the right to work in any city provided he conforms with the working rules and conditions of the locality and that no strike or lockout exists in that locality.

When a contractor, builder or boss painter does any work pertaining to our trade outside his home city or town—and in a locality where a District Council or a Local Union exists—not less than fifty (50) per cent. of the men in such district shall be employed on all work coming within the jurisdiction of the Brotherhood of Painters, Decorators and Paperhangers of America as defined in the General Constitution.

Sec. 133. A member leaving the jurisdiction of the local union in which he is a member to work for his employer on a job in the jurisdiction of another local union must comply with the working rules and laws of that locality and demand in all cases the shorter work day and the higher scale.

Organization of Local Unions.

Sec. 149. A local union may be organized by seven or more persons engaged in any of the branches of the trade enumerated in Section 1 of this constitution, provided they are qualified. They must apply to the G. S. T. for a charter and send $15.00 charter fee. The G. S. T. shall forward a charter, a set of three rituals, a roll book, a secretary's minute book, twenty constitutions, twenty membership books and all necessary cards and forms, including bond application forms, together with a metal seal and full set of financial books.

Local Autonomy.

Sec. 151. Each local union shall have trade autonomy over that branch of the craft in which its members are employed; also control over the scale of wages. But where a district council exists the scale of wages and trade rules must be submitted to and be approved by the council at or before the time when it is consider-

ing agreements between its affiliated unions and the employers. Any section of this constitution conflicting with this section shall be null and void when pertaining to and used to interfere with the trade autonomy of this section.

Local By-Laws.

Sec. 156. Each local union shall frame its own by-laws, which shall in no way conflict with the Constitution of the Brotherhood, or (where one exists) with the constitution and working rules of the district council. All by-laws and scales of wages shall be submitted (in duplicate) to the district council (if any) with which the local is affiliated and to the G. E. B. for their approval before being printed or enforced. One copy shall be returned approved or corrected, the other shall be filed at the General Office for reference.

Agreements.

Sec. 210. Local unions and district councils shall, wherever possible, make yearly agreements with the employers governing the hours of work, scale of wages and all other matters that are to the interest of the members, but no union or district council shall make any law or sign any agreement specifying that members of the Brotherhood shall work only for Master Painters who are members of a Master Painters', Decorators' or Wall Paper Dealers' Association or combination.

Sec. 212. All working agreements must be submitted to the General Executive Board for consideration and must be kept inviolate.

The G. E. B. shall not approve of a graded wage scale; it is demoralizing to the trade, an incentive to reckless competition and, when work is scarce, causes

first-class men to offer their labor at second-class prices. Employers may grade the wages above the minimum and thus reward exceptional skill.

Clearance Card Laws.

Sec. 238. A member in good standing wishing to leave the jurisdiction of his local union must apply to the Financial Secretary for a Clearance Card; he must pay up all arrearages and 10 cents for the card; it shall not require a vote of the local union for its issue. Should a member less than one year in membership apply for a Clearance Card, it shall be granted with the provision that if he deposit it in a local union where a higher initiation fee prevails he shall pay the difference between such fees to the local union accepting his card.

Sec. 243. A member carrying a Clearance Card shall deposit it in some local union before the expiration of thirty days from date of issue. The right to so deposit this card terminates thirty days from the date of issue except as provided in Section 246. Provided, however, that a Local Union accepting a Clearance Card shall at once notify the Union from which card is issued.

Sec. 245. A member of the Brotherhood who visits a city or town in search of employment shall deposit his Clearance Card with some official of the union within forty-eight hours after his arrival.

Sec. 246. If more than forty-eight hours in the jurisdiction of the local union or district council before presenting his card he may be fined, not to exceed $10.00. If the member can show that failure to deposit card within the prescribed time is caused by circumstances beyond his control or can give satisfactory reasons for the delay the local union may accept the card upon payment of all arrearages and may omit the

imposition of any penalty; but this shall not apply to those more than six months in arrears.

Sec. 248. A member making application for Clearance Card shall be required to state whether he is leaving the jurisdiction of his local union or district council to continue in the employ of his home firm in some other jurisdiction. A member obtaining and using Clearance Card in violation of this law shall, upon proof of such violation, pay to the Local Union issuing the card a fine not exceeding $25.00.

Strike and Lockout Laws.

Sec. 256. Local unions, district councils and the G. E. B. shall do all in their power to discourage strikes and lockouts, and adopt such means as will tend to bring about an amicable understanding between members and their employers.

Misconduct and Penalties.

Sec. 271. Any member who acts in violation of his obligation or who violates any article or section of the constitution of the Brotherhood or of the by-laws of a local union, shall be fined or expelled at the discretion of the local union.

Local unions of special branches shall have the power to enforce and collect fines for all violations of the special trade rules of that particular branch of the trade.

Sec. 274. Any member going to work on a job declared non-union shall, after trial and conviction, be fined as the district council or local union may decide.

Sec. 275. No member of this Brotherhood shall injure the interests of another by undermining him in prices or wages, or wilfully performing any other act by which the situation of any member may be placed

in jeopardy; nor shall he be allowed to work within the jurisdiction of any local union with anyone who does not carry a membership card.

Charges and Trials.

Sec. 282. Any member having knowledge of the violation of any section of the constitution or by-laws shall prefer charges against the offending member.

Plaintiff's Exhibit P-3. Trade and working rules of District Council No. 10—Brotherhood of Painters.

RULES.

All members should study these rules, and also, the General Constitution of the Brotherhood. Members working in the jurisdictions of other District Councils or Local Unions will be subject to their rules and should get information thereon without delay. In a number of localities the 5 day or 40 hour week is observed. Members working for their home shop in an outside locality are permitted to do so for a period not exceeding 60 days, without taking a Clearance Card. In such cases, the shorter work week, and the higher rate of wages, should either or both prevail, must be lived up to. Any information desired will, if available be furnished by any Business Agent or Union officer, and no plea of ignorance of the law will exempt any one from prosecution or penalty for violations.

Candidates for membership, and Apprentices are also subject to these rules. Apprentices are not permitted to work alone on any job with tools or brushes. Candidates will not be recognized on jobs by members unless they have the official permit from the Business Agent.

Sec. 1. This District Council shall consider all charges and trials of members for violation of the rules, both local and general, and shall affix and enforce all penalites. It shall settle all grievances or disputes in connection with the trade between members, or between members and employers.

Sec. 2. Members knowing of violations of these rules, and willfully failing to report same to the Business Agent or to the District Council, shall be liable to prosecution and fine.

Sec. 3. Any member who refuses to obey the Business Agent, or any order of this District Council, shall be subject to a fine at the discretion of the Council.

Sec. 4. Members must attend at least one meeting of their Local Union in the month, and have due book properly punched. Unless a reasonable excuse is given for failure to comply with this rule, a fine of 25¢ will be charged by the Local Financial Secretary for each month not punched.

Sec. 5. Dues must be paid before the expiration of each month. A fine of 25¢ will be charged by the Local Financial Secretary for each month's dues in arrears.

Sec. 6. The minimum dues of members shall be $1.25 per month. The minimum dues for non-beneficial members shall be 25¢ per month, and the same rate shall apply to Apprentices, excepting that Apprentices' dues shall be payable at the District Council.

Sec. 7. Quarterly Work cards shall be issued by this District Council, and these, as well as due book must be carried by members in the shop or on jobs, and are to be shown any Business Agent or other good standing member on demand. No member shall be allowed to hold a card in any dual organization.

Sec. 8. Eight hours shall be considered a regular day's work, from 8 till 12 A. M. and from 1 to 5 P. M. or from 12.30 to 4.30 P. M. No work shall be permitted

between 7 and 8 A. M. or from 5 to 6 P. M. Or between 4.30 and 6 P. M. Or between 4.30 and 6 P. M. where one-half hour is taken for dinner. Work between all other hours shall be considered as overtime, and double pay must be received therefor. Work on Sundays or legal holidays must also be paid at the rate of double time. Legal holidays observed are Jan. 1, Feb. 22, May 30, July 4, Thanksgiving Day, and Dec. 25, or those days on which the respective holidays are celebrated. No work shall be allowed under any circumstances on Labor Day, or on Saturday afternoons between 12 and 6 o'clock. Penalties for violations are at the discretion of the Council. Sunday work shall be allowed only on permit from the Business Agent, and offenders shall be fined $15 for the first offense, and double that sum for each succeeding violation. See Sec. 22.

Sec. 9. The minimum wages or rate of pay for journeymen shall be $1 per hour or $8 per day. Paperhangers working piece work shall be paid according to the established price list.

Sec. 10. Members shall not report to the shop before 7.30 A. M., or to the job before 7.45 A. M., or begin work before 8 A. M.

Sec. 11. For all work out of town, traveling time, fares and board shall be paid, traveling time to be considered as single time. All fares beyond the initial car, bus, or transfer limits shall also be paid by employers.

Sec. 12. Members shall be allowed time during working hours on pay day, when wages are not paid on the job, to travel to shop or office to receive same. Wages should be paid weekly. Members accepting checks for wages do so at their risk, and thereby forfeit any right to request the Council to act as collector.

Sec. 13. Members laid off (discharged) before end

of week or pay day, shall receive accumulated pay immediately from employer, or else waiting time shall be demanded.

Sec. 14. Members shall not travel between job and shop, or between jobs during lunch hour with or without tools.

Sec. 15. Members shall not work with suspended members, or non-union men, or with Apprentices not regularly registered or recognized as belonging in respective shops.

Sec. 16. Members shall not work in shops or on jobs that have been declared unfair by this Council, or where a strike has been ordered by this Council or its representatives.

Sec. 17. Foremen, chargemen, or shop or job stewards, or those recognized as such, or the first man on any job, in the order named, shall be responsible for reporting to the Business Agent or Council any non-union men, or members not having workcard or due book on such jobs within 24 hours.

Sec. 18. None but members in good standing in this Brotherhood shall be allowed to remove old paper or calcimine from ceilings or walls, or to wash or prepare such.

Sec. 19. In times other than when strikes or lockouts exist, members who desire to take work temporarily must report such to the Business Agents or Council, and permits to do such work must be procured. No such work shall be permitted in partnership with other members unless sanctioned by the Council. Sub-contracting from, or working in partnership with employers of non-union men, or lumping, or working in partnership with other members is forbidden. Violation of any part of this section is punishable by a fine of $25 or expulsion from the B. Any member who takes work for himself without reporting this to the Council

shall either be obliged to pay the stated fine, or resign from his Local Union.

Sec. 20. Intoxicated members or those using profane or indecent language in the meetings of the District Council or Local Unions, or those who repeatedly disturb the harmony of such meetings shall be ejected therefrom, or otherwise denied the privileges of such meetings.

Sec. 21. No member or officer of the District Council or its affiliated Local Unions shall publish or circulate, prematurely, any official action taken by either body, unless authorized to do so.

Sec. 22. Permits for Sunday work shall be issued for no other jobs than in stores, offices, factories, or such other places when work during week days would be impossible, insofar as interfering with the business of the occupants of such places.

Plaintiff's Exhibit P-4. (Letterhead of Brotherhood of Painters, Decorators and Paperhangers of America.)

New York, December 5, 1921.

To All Contractors employing Members of Affiliated Local Unions of the Brotherhood of Painters, Decorators and Paperhangers of America.

Greeting:

I have been instructed by the New York District Council No. 9 to notify all our fair employers of the following amendments to our General Constitution passed at the last Convention held at Dallas, Texas.

1. An amendment abolishing the fifty per cent. clause. This gives the employer the right to employ all his men in his home town to work on a job removed from the said home town, or the further right to employ the full quota of men required to carry on the work,

from the membership of the local or locals in the city, town, &c., where the job is located.

2. An amendment providing for the higher scale of wages to be paid to ALL men employed: In the event that an employer contracts work in a locality where the wage scale is higher than that prevailing in the jurisdiction of his home city or town, the higher wage scale must be paid to all men engaged by him, irrespective of whether they are employed in the locality where the work is being done, or in his home city, town, &c.

The above-described amendments are in full force and effect. You are therefore kindly asked to be guided accordingly.

Yours very truly,

(Signed) THOS. MCMURRAY,
Secretary.

DEFENDANTS' EXHIBITS.

Exhibit D-1.

Sec. 62. Neither the General Executive Board nor any other authority shall have power to grant exclusive or special privileges to any local union or district council working under a charter of this Brotherhood; nor shall the G. E. B. or any other authority be invested with power to force any employer to bring men from one city to work in another city if union men can be procured in such city where the work is to be erected and finished. All conditions of such localities shall be strictly adhered to, the shorter work day and the higher scale to prevail in all cases. A card fully paid up, regardless of where it is issued, shall entitle the holder to the right to work in any city provided he conforms with the working rules and condi-

tions of the locality and that no strike or lockout exists in that locality.

When a contractor, builder or boss painter does any work pertaining to our trade outside his home city or town—and in a locality where a District Council or a Local Union exists—not less than fifty (50) percent. of the men in such district shall be employed on all work coming within the jurisdiction of the Brotherhood of Painters, Decorators and Paperhangers of Amerika as defined in the General Constitution.

Exhibit D-2.

From April, 1922, to Jan., 1923.

OUT-OF-TOWN JOBS.

Employer	Job	Wages	No. Men
Hoggson Bros.	City Nat. Bank, Evanston, Ill.	$9.00	5
W. & J. Sloane	1600 Melrose Pl., Knoxville, Tenn.	9.00	3
J. S. Kelly	St. John's Hospital, L. I. City, N. Y.	9.00	4
Hoggson Bros.	City Nat. Bank, Evanston, Ill.	9.00	4
W. & J. Sloane	O. Edwards' House, 5607 Fifth Ave., Pittsburgh, Pa.	9.00	3
	1—local 6		
Mack, Jenny & Tyler	J. Widener, Elkins Park, Pa.	9.00	9
C. S. McKune	Scarsdale, N. Y.	9.00	19
	10 local men		
C. T. Wills	Chappaqua, N. Y.	9.00	2
F. R. Humrich	San Simeon, Cal.	9.00	7
N. J. Mathieu	H. H. Teagler, Millbrook, N. Y.	9.00	3
Wm. Delve	Ridgefield, Conn.	9.00	6
C. & H. Schmidt	Syosset, L. I. Webb Estate	9.00	6
W. & J. Sloane	Dr. Greenway's Res., Greenwich, Conn.	9.00	5
W. & J. Sloane	Briarcliff Manor, N. Y.	9.00	5

Employer	Job	Wages	No. Men
F. Rose & Co.	Sewickley, Pa.	9.00	3
P. W. French Co.	G. D. Pratt, Glen Cove, L. I.	9.00	4
Wm. Delve	H. James Res., New Canaan, Conn.	9.00	2
Chas. Rinschede	Gutman's House, Silver Mine, Conn.	9.00	2
J. E. Hellberg	Nassau County Tuberculosis Hospital, Farmingdale, L. I.	9.00	5
Hoggson Bros.	Easton, Pa.	9.00	7
W. & J. Sloane	Tamaqua, Pa. Greehan's Res.	9.00	6
Gunn & Borgo	Lansc. Hill Rd., Fairfield, Conn.	9.00	2
Trischka Dec. Co.	Dr. Ayers, Glen Cove, L. I.	9.00	2
Alavoine	Mackay, Roslyn, L. I.	9.00	3
W. & J. Sloane	Mrs. Alpred, Glen Cove, L. I.	9.00	4
Story & Flickinger	Tarrytown, N. Y.	9.00	7
	4 local 531 men		
Chas. Rinschede	Mrs. Cravens' House, 5 Park Terrace, Larchmont, N. Y.	9.00	8
Hoggson Bros.	Easton Trust Co., Easton, Pa.	9.00	8
P. W. French Co.	Bolton Landing, N. Y.	9.00	6
E. Dumble	Hofstrass' House, Hempstead, L. I.	9.00	4
A. Reinhardt	Bloomfield, N. J.	9.00	5
Hoggson Bros.	Rockford, Ill.	9.00	3
Wm. Baumgarten Co.	Lang Dry Dock Co., 14th St. Hoboken, N. J.	9.00	25
Wm. Kallies	E. S. Harkness, New London, Conn.	9.00	2
J. B. Wilson	Washington, D. C.	9.00	4
Chas. Rinschede	Batterman's Res., Mill Neck, L. I.	9.00	4
Mack, Jenny & Tyler	M. Guggenheimer's Res., West End, N. J.	9.00	15
	6 local men—L. 400		
H. F. Huber & Co.	Miss Torombly, Madison, N. J.	9.00	7
Hoggson Bros.	South Bend, Ind.	9.00	5
Mack, Jenny & Tyler	St. Paul's Church, Philadelphia, Pa.	9.00	5

Employer	Job	Wages	No. Men
	2 local men—703		
Hoggson Bros.	Bradford, Pa.	9.00	5
	1 local—L. 110		
W. & J. Sloane	N. C. Heath, Columbia, S. C.	9.00	4
Hoggson Bros.	South Bend, Ind.	9.00	8
	2 local men—L. 1118		
W. & J. Sloane	S. T. Smithers, Glen Cove, L. I.	9.00	3
	1 local 822		
Righter & Kolb	45 Palisade Ave., Englewood, N. J.	9.00	3
Wm. Delve	Flushing, L. I.	9.00	8
Hoggson Bros.	Bradford, Pa. (or Tenn.)	9.00	10
	6 local union 110		
Hoggson Bros.	South Bend, Ind.	9.00	7
	2 local union 1118		
C. Rinschede	Huntington, L. I.	9.00	6
Trischka Dec. Co.	T. B. Felder, Greenwich, Conn.	9.00	6
Wm. Baumgarten	85 Glenwood Ave., Jersey City, N. J.	9.00	8
E. Dumble	25 Larchmont Ave., Larchmont, N. Y.	9.00	5
Tiffany Studios	White Plains, N. Y.	9.00	9
Wm. Delve	Levering, Greenwich, Conn.	9.00	2
E. Dumble Co.	Jewett's House, Tuxedo Park, N. Y.	9.00	6
	1 local union 818		
J. P. Wilson	Shedhar's, Milton Pt., Rye, N. Y.	9.00	2

It is submitted that the foregoing summary and copies of exhibits be used in place of the full exhibits.

(Sgd.) MERRITT LANE,
Attorney for Plaintiff.

(Sgd.) HENRY CARLESS,
Attorney for Defendants.

ORDER APPROVING STATEMENT OF EVIDENCE.

And Be It Further Remembered, that the foregoing comprises the substance of all of the testimony in the case necessary to explain the issues and questions involved and the relation of the parties thereto, said testimony being set forth in narrative form, except such portions as are set forth in the exact words of the witness at the request of the parties and at the direction of the Court, and due notice having been given by the Barker Painting Company at the time and place when and where it would ask the Court to approve the statement, and both parties being in Court by counsel, and no objection being signified to the foregoing statement of evidence, the Court does now on this eleventh day of March, 1929, direct, at the request of the parties, that that portion of the testimony hereinbefore set forth as in the exact words of the witness, to be so reproduced as a part of the record on appeal, and does also approve the foregoing statement as true, complete and properly prepared. and that it be made a part of the record, and it is so made a part of the record accordingly.

(Sgd.) Wm. N. Runyon,
District Court Judge.

Above statement of evidence consented to.

(Sgd.) Merritt Lane,
Attorney for Plaintiff,
(Sgd.) Henry Carless,
Attorney for Defendant.

PRÆCIPE FOR RECORD.

Plaintiff designates to constitute the record upon its appeal, heretofore stated in the above entitled cause, the following:

1. Original bill of complaint.
2. Answer of the defendants.
3. The replication.
4. The opinion of the Court.
5. Final decree and exception thereto.
6. Petition and notice of appeal.
7. Order allowing appeal.
8. A statement of the undertaking on appeal.
9. A statement of the bond on appeal.
10. A statement of the orders extending term.
11. Assignment of errors.
12. This præcipe.
13. The statement of the evidence approved and signed.

(Sgd.) MERRITT LANE,
Attorney for Plaintiff.

Minute entry of argument and submission June 6, 1929, omitted in printing.

In United States Circuit Court of Appeals for the Third Circuit, March Term, 1929

No. 3912

Barker Painting Company, Plaintiff-Appellant,

v.

Local No. 734, Brotherhood of Painters, Decorators and Paperhangers of America; Brotherhood of Painters, Decorators and Paperhangers of America; George W. Hoffman, and Harry S. Warren, Defendants-Appellees

On Appeal from the District Court of the United States for the District of New Jersey

Before Woolley and Davis, Circuit Judges, and Rellstab, District Judge

Opinion—Filed August 12, 1929

Woolley, Circuit Judge:

The plaintiff appealed from a final decree of the District Court for the District of New Jersey, entered before yet in harmony with the decision of this court in Barker Painting Company v. Brotherhood, 15 Fed. (2d) 16, dismissing its bill which challenged the validity of rules prescribed by Sections 132 and 133 of the Brotherhood's Constitution. (See rules in case cited.) The same plaintiff made a like attack by its bill filed in the District Court for the Eastern District of Pennsylvania in the case just mentioned wherein the same questions were raised and decided by this court though on appeal from an interlocutory decree denying a preliminary injunction. Of course we should not be disposed, through the medium of this case, to re-try the other case and in effect reverse its decision if the two cases are based on substantially the same facts and this one, therefore, raises no new question of law or no

new aspect of an old question. Realizing this, counsel for the plaintiff selected expressions from our opinion in the Pennsylvania case in which he found an implication that we had rather summarily and without full consideration disposed of that case because on appeal from a decree merely refusing a preliminary injunction and, pointing to the difference between the two decrees,—there interlocutory, here final,—represented that the evidence, which in that case we said (as a caution against commitment on another state of facts) was not sufficient to invoke the extraordinary remedy of injunction, is supplied in this case by evidence which does justify such a remedy, and, thus setting up a new case, asked for a reconsideration of the law and reversal of our previous position.

We heard the argument at length. On our study of the record we of course found the facts in this case different from those in the Pennsylvania case as to place of work, personnel, dates, etc., but similar in character and action, and found no new facts which differentiate this case from the other or raise any new question of law. The same questions run through both cases, as indeed they do in all the reported cases on the subject, whether decided on interlocutory or final decree. New Jersey Painting Co. v. Local No. 26, 95 N. J. E. 108; 122 Atl. 622; reversed, 96 N. J. E. 632; 126 Atl. 399; Hass, Inc. v. Local Union No. 17, 300 Fed. 894; Marshall v. Brotherhood, Common Pleas, Philadelphia, not reported; Douglas & Bros. Inc. v. Mallette, Superior Court, Rhode Island, not reported; Barker Painting Co. v. Brotherhood, 15 Fed. (2d) 16, certiorari denied, 273 U. S. 747; Barker Painting Co. v. Brotherhood, 23 Fed. (2d) 743, certiorari denied, 276 U. S. 631. While we should be more than satisfied to have this controversy between employer and organized labor finally decided by the higher court, we are constrained, until then, to stand by the decision which we made not casually but after serious study and, we confess, much mental disturbance.

Aside from this position, we decline to take up the case on the merits because of another situation which counsel for the plaintiff was passing in silence when his attention was called to it from the bench and around which counsel for the defendants trod lightly. It is this.

The Barker Painting Company, a corporation of New York with its "home office" in New York City, had a contract for painting at Somerville, New Jersey The job was about thirty per cent completed when the defendant union called off its men by force of the offending rules which require a contractor to pay the wage rate of his home district or that of the locality of the work, whichever is higher. The Barker Company filed the bill in equity in this case stating the facts and alleging unlawfulness of the rules because violative of sundry provisions of the federal conconstitution and federal laws. The trial judge issued a preliminary injunction, mandatory in character in that it restrained the workmen from observing the union rules and from not returning to work. All the men save one obeyed the injunction, returned to work and completed the job. Whether the job was completed before the end of the final hearing on June 29, 1925, about four months after the isssuance of the preliminary injunction, is not disclosed by the record, but, on the plaintiff's concession, it was completed before the trial court handed down its opinion on April 14, 1926 and entered the final decree on March 23, 1928 dissolving the preliminary injunction and dismissing the bill.

Thus it is clear the questions which the plaintiff has raised are moot because, having been saved from injury throughout the work by the preliminary injunction, it has sustained no damage by the defendants' abortive enforcement of its rules. While as a matter of fact, or, perhaps, a matter to be inferred from the averments of the bill or from their past practices, the defendants propose to continue to enforce their rules, it does not follow necessarily that they will enforce them against the plaintiff or that the plaintiff will continue in business, or that, continuing in business, it will suffer by the rules' enforcement. It is just here that two odd things occurred, one that, though it suffered no damage through the operation of the Brotherhood rules, the plaintiff wants us to review this case and reverse our decision in the former case for its protection in the future, and the Brotherhood, not satisfied with one pronouncement by this court sustaining its rules, remained silent (until aroused by the court) as to the moot aspect

of the case, with the evident desire that its rules be further strengthened by another decision to the same effect.

Declining to yield to the desire of either party, we affirm the decree of the District Court, not on the merits but for the reasons stated.

A true copy. Teste: —— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit

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In United States Circuit Court of Appeals for the Third Circuit, March Term, 1929

No. 3912 (List No. 74)

Barker Painting Co., Appellant,

vs.

Local Brotherhood of Painters, etc., Appellees

Appeal from the District Court of the United States for the District of New Jersey

Decree—Filed Aug. 12, 1929

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed, with costs.

Philadelphia, August 12, 1929.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 9, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,608. U. S. Circuit Court of Appeals, Third Circuit. Term No. 477. Barker Painting Company, petitioner, vs. Local No. 734, Brotherhood of Painters, Decorators and Paperhangers of America, et al. Petition for writ of certiorari and exhibit thereto. Filed November 6, 1929. File No. 34,608.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } *ss.:*

I, George T. Cranmer, Clerk of the District Court of the United States, for the District of New Jersey, do hereby certify that the foregoing is a full, true and complete transcript of the record in the case of Barker Painting Co., Plaintiff, vs. Local No. 734 Brotherhood of Painters, Decorators and Paperhangers of America, et als., according to the direction of counsel herein filed, as the same remains of record and on file in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at Trenton, in said district, this nineteenth day of March, 1929.

(Sgd.) GEORGE T. CRANMER,
(Seal) *Clerk.*
By (Sgd.) CHARLES S. CHEVRIER,
Deputy Clerk.

FILE COPY

No. 477

CHARLES EL

IN THE

Supreme Court of the United States

BARKER PAINTING COMPANY,

Petitioner,

vs.

LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA; BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA; GEORGE W. HOFFMAN AND HARRY S. WARREN,

Respondents.

Petition for Writ of Certiorari Directed to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

MERRITT LANE,

Attorney for and of Counsel with Petitioner.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

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IN THE

Supreme Court of the United States

BARKER PAINTING COMPANY, *Petitioner,* *vs.* LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA; BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA; GEORGE W. HOFFMAN and HARRY S. WARREN, *Respondents.*	*Petition for Writ of Certiorari Directed to the United States Circuit Court of Appeals for the Third Circuit.*

(Italics mine except where otherwise noted.)

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, BARKER PAINTING COMPANY, a corporation organized and existing under the laws of the State of New Jersey, humbly showeth:

1. A bill in equity was filed in the United States District Court, for the District of New Jersey, by petitioner, Barker Painting Company, which has its home office in the City of New York, and is engaged in the business of painting and decorating over the United States and Canada, including the States of New York, New Jersey, Pennsylvania and the District of Columbia, to enjoin the respondent, the Brotherhood of Painters, Decorators and Paperhangers of America, a National labor organization, operating throughout the entire United States, and the respondent Local No. 734, which claims jurisdiction over all persons engaged in painting or decorating within the territory of Somerville, Somerset

County, New Jersey, and the respondent, Harry S. Warren, who is the organizer for the State of New Jersey of the National union, and the respondent, George W. Hoffman, who is the business agent of Local No. 734, to enjoin the enforcement, by strike and interference with the employees of petitioner, of a rule of the National union which requires an employer, performing work other than in his home city, to pay the wage scale, either of his home city or of the place where the work is being performed, *whichever be the higher* (Bill of Complaint, p. 3). The bill alleged, and the proof on final hearing showed that: Petitioner employed exclusively union labor, operating closed union shop; petitioner on November 8, 1924, took a contract from the general contractor for the painting work on a hospital in Somerville, Somerset County, New Jersey; the contract provided that the work should be performed as required by the progress of the job; petitioner proceeded, employing help all local to Somerville except the foreman; it complied with all union conditions as to hours and wages, etc., for the territory including Somerville; the work proceeded from December 7, 1924, to February 21, 1925, with all of the men satisfied; on February 21, 1925, George W. Hoffman, the business agent of Local No. 734, instructed by Harry S. Warren the state organizer of the National union, insisted that petitioner pay the wage scale of New York, its home town, which was higher than that for Somerville, and threatened that, if it did not, the employees of petitioner would be directed not to work; petitioner refused; the men were directed to cease work and did so although satisfied with their wages, hours and working conditions; they ceased only because they feared, if they continued at work, that they would be expelled from the union and thereby deprived of earning a livelihood, the industry being, in effect, 100 per cent. unionized; the painting industry in New York, northern New Jersey, Connecticut and Pennsylvania was and is so unionized, and all other

branches of the building industry in the territory were and are so unionized, and the agreements between the different branches of the industry were and are such, as that no painting work could or can be performed except with union labor, for if it were so performed, all other branches of the industry would withdraw from the building and it could never be completed; a contractor cannot be "fair" in one place and "unfair" in another and if he employs non-union labor on one job all of his jobs, whether manned exclusively with union labor or not will be struck throughout the country, and all building trades would withdraw from any job upon which he was employed anywhere in the country; the National union threatened to compel petitioner and all other painting contractors to comply with the rule by strikes, boycotts, etc.; the effect of the rule and its enforcement already had been such as that painting contractors of New York could not take work in New Jersey; the business is highly competitive and the effect of the rule, if enforced, would be to limit all painting work to local contractors.

2. The bill was filed March 16, 1925 (p. 3) to enjoin the enforcement of the rule, and the actual interference with the performance of the contract of petitioner for the painting work on the hospital in Somerville was alleged as an overt act and an injunction prayed against that interference. Upon the filing of the bill *ad interim* restraint went and, before final hearing, the building had been completed.

3. The case came on for final hearing, and, on April 14, 1926, an opinion was filed by Runyon, District Judge (p. 20), which resulted in the final decree dismissing the bill (p. 33).

4. From that decree an appeal was taken to the Circuit Court of Appeals for the Third Circuit, which resulted in the opinion of the court August 12, 1929, and the order of affirmance (Addendum to the State of Case).

5. The jurisdiction of the District Court was based both upon diversity of citizenship and constitutional grounds.

6. The Circuit Court of Appeals declined to consider the merits for two reasons: (1) Because of its prior decision on a review from the denial of a preliminary injunction by the District Court for the Eastern District of Pennsylvania (Judge Buffington dissenting) in *Barker Painting Company* v. *The Brotherhood,* 15 Federal (2nd) 16, and (2) Because the particular work of petitioner, which had been interfered with by the union, had been completed pending the proceedings under the protection of the temporary restraint.

7. Petitioner has therefore been deprived of a review upon the merits by the Circuit Court of Appeals.

8. The writ of certiorari is applied for because the Circuit Court of Appeals, in declining to review the decree dismissing the bill upon its merits, decided an important question of general law in a way probably untenable and in conflict with the weight of authority, and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of this court, and because the decree of the District Court decided a matter of so much general importance and of so far-reaching effect as to call for the determination of this court and because the District Court gave effect to a statute of New Jersey which, as construed by the Court of Errors and Appeals of New Jersey in *New Jersey Painting Co.* v. *Local No. 26,* 96 N. J. Eq. 632; 126 Atl. 399, overruling its prior decision in *Jonas Glass Co.* v. *Glass Bottle Blowers Assn.,* 77 N. J. Eq. 219; 79 Atl. 262 (written by Chancellor Pitney, afterward a justice of this court) and as construed by the District Court is offensive to the provisions of the 14th Amendment to the Constitution, upon the reasoning of the determination of

this court in *Truax* v. *Corrigan*, 257 U. S. 312; 66 L. Ed. 254.

9. The decision of the Circuit Court of Appeals for the Third Circuit, in *Barker Painting Company* v. *The Brotherhood*, 15 Federal (2nd) 16, was on a review of a decree refusing a *preliminary* injunction. Judge Woolley, writing the opinion for the majority of the Court (Judge Buffington dissenting), after referring to what might be urged by the union as justification for the rule, said:

> "We advert to these possibilities, certainly not to express our views, nor to intimate sympathy with the rules—for assuredly we have none—nor to suggest arguments in support or reasons justifying their promulgation, but merely to show that many variable and intangible factors inevitably enter into the situation, making the injunctive process of doubtful propriety and legality."

He further referred to the fact that, up to the time of the pronouncement of the decision, all the decisions of the State Courts were against ~~enjoining~~ the enforcement enjoining of the rule while all of the decisions of the Federal Courts were contra and he said (p. 17):

> "The learned trial court was inclined to the reasoning of the state decisions; and so are we, not because the respondents have shown that the rules are lawful, but, rather, because the complainant has failed to show that they are unlawful."

The effect of the refusal of the Circuit Court of Appeals to consider the instant case on its merits was to give to its prior decision the quality of *res adjudicata*, although that decision was on an application for a temporary injunction which never issues except where the injury is imminent and the right clear both upon the law and the facts.

10. The effect of its refusal to review because, pending the suit, the particular work was completed was to treat the overt act, *i. e.*, the interference with the particular

contract, as that which was sought to be enjoined and to ignore the rule that equity acts to prevent a reasonably anticipated injury and actual injury is not required to set the court in motion.

The bill was aimed not only at the interference by the union with the performance of the particular contract but also at the anticipated acts of the union with respect to *all* of the work of petitioner throughout the country. The interference with the particular contract was relied on only as showing the reasonable probability that the union would so interfere generally.

11. The Circuit Court of Appeals in its decision in *Barker Painting Co.* v. *The Brotherhood,* 15 Fed. 2nd, p. 16 expressed no sympathy with the rule but stated that it was constrained to its holding as the result of a "cold consideration of the cited authorities." In the instant case it said:

> "While we should be more than satisfied to have this controversy between employer and organized labor finally decided by the higher court, we are constrained, until then, to stand by the decision which we made not casually but after serious study and, we confess, much mental disturbance."

12. The effect of the decision of the District Court, which it is sought to review here, is to permit a labor organization operating over the entire country in a trade so closely unionized and so affiliated with other trades so closely unionized as that it is impossible for an employer to perform work without its consent, to arbitrarily discriminate between employers in the matter of wages demanded, the discrimination being based solely upon the residence of the employer, and to permit unions to combine, and such combinations, which may control labor throughout the United States, in an industry so unionized as that no work can be performed by an employer without employing union labor, to establish and enforce such discrimination. By such means employers of labor may

be driven out of a community, except those who may have their residence therein.

13. The difference in the wage scale is based solely upon the home town of the employer. He may employ at the place where the work is being performed all local help, yet, if the wage scale at his home town is higher than the wage scale at the place of performance of the work, he must pay the wage scale of his home town.

14. The District Court based its decision largely upon the statute of New Jersey, P. L. 1883, p. 36, 3 C. S. of N. J. 3051, sec. 128 reading as follows:

> "That it shall not be unlawful for any two or more persons to unite, combine, or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise, or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons or corporations."

It relied upon the decision of the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26,* 96 N. J. E. 632; 126 Atl. 399 (reversing the Court of Chancery of New Jersey, 95 N. J. E. 108; 122 Atl. 622, in granting an injunction in a case similar to that at bar) construing that statute and overruling its previous decision in *Jonas Glass Company* v. *Glass Bottle Blowers Association,* 77 N. J. E. 219; 79 Atl. 262, which was to the effect that, if the statute was to be construed as the Court of Errors and Appeals *did* construe it in *New Jersey Painting Company* v. *Local No. 26,* 96 N. J. E. 632; 126 Atl. 399, it was unconstitutional under New Jersey Constitution, article I, par. 1, which is the due process clause of the New Jersey Constitution, and, if offensive to that provision of the New Jersey Constitution, it would be equally offensive to the provision of the 14th Amendment to the Constitution of the United States which prohibits a state enforcing any law which denies due process of law

or the equal protection of the law. The District Court adopted the construction put upon the statute by the New Jersey Court of Errors and Appeals in *New Jersey Painting Company* v. *Local No. 26,* 96 N. J. E. 632; 126 Atl. 399, and gave effect to the statute as so construed with the result that the decree rests upon a statute which, as construed by the New Jersey Court of Errors and Appeals and by the District Court, is offensive to the provisions of the 14th Amendment to the Constitution of the United States.

Wherefore your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said United States Circuit Court of Appeals for the Third Circuit, and of the District Court of the United States, for the District of New Jersey, and all proceedings in both courts, to the end that the said case may be reviewed and determined by this court, as provided by law, and that your petitioner may have such further and other relief or remedy in the premises as to this court may seem appropriate, and that the said decree of the United States Circuit Court of Appeals for the Third Circuit affirming the decree of the United States District Court for the District of New Jersey may be set aside and that the decree of the United States District Court, for the District of New Jersey, may be set aside and the record remitted to that court with instructions to enter a decree granting the relief prayed for by the plaintiff, and your petitioner will ever pray, etc.

MERRITT LANE,
Attorney for and of Counsel with Petitioner.

BRIEF IN SUPPORT OF APPLICATION FOR FOR CERTIORARI.

I.

The opinion of the court below.

The opinion of the United States District Court, for the District of New Jersey, the court of first instance, is reported in 12 Federal (2nd) 945, and is printed p. 20 of the record. The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 34 Federal (2nd) p. 3 (Advance sheets) and is printed in the addendum to the record.

II.

Jurisdiction.

The jurisdiction of this Court is rested on Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, sec. 1, 43 Statutes 938, sec. 347, title 28, U. S. C. A., p. 359.

The date of the decree of the United States Circuit Court of Appeals for the Third Circuit to be reviewed is August 12, 1929 (Addendum to record).

III.

The grounds on which the jurisdiction of this court is invoked.

In declining to review the decree of the United States District Court, for the District of New Jersey, upon its merits, the Circuit Court of Appeals for the Third Circuit has decided an important question of general law in a way probably untenable and in conflict with the weight of authority and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

The United States District Court for the District of New Jersey and the Circuit Court of Appeals for the Third Circuit, by affirming its decree, have determined a matter of such general interest in a way which will lead to such incalculable harm and injury to rights of employers as that the matter should be reviewed by this court and have given effect to a statute of New Jersey, P. L. 1883, p. 36, C. S. of N. J. 3051, sec. 128, which, as construed by the District Court, is offensive to the 14th Amendment of the Constitution of the United States in that it denies due process of law and the equality of the law.

IV.

Statement of the case.

The case is fully stated in the petition, paragraph 1.

V.

Specification of errors.

1. The Circuit Court of Appeals erred in declining to consider the merits of the appeal because of its prior decision in *Barker Painting Company* v. *The Brotherhood*, 15 Fed. (2nd) 16—

2. The Circuit Court of Appeals erred in declining to consider the merits because the particular work of petitioner which had been interfered with had been completed, under the protection of a temporary injunction.

3. The District Court erred in dismissing the bill and the Circuit Court of Appeals for the Third Circuit erred in affirming for the reasons that— (a) The conduct of defendants is a boycott, the result of a conspiracy, illegal at common law; (b) The rule is unreasonable and the classification bears no reasonable relation to the wage scale and the attempt of the unions to enforce the rule by

combination is unlawful and a violation of the rights of petitioner; (c) The combination is in unfair restraint of trade, inimicable to public welfare and in violation of the public policy both of the State of New Jersey and of the United States and the combination and conspiracy is denounced by the Act of July 2, 1890, chapter 746, 26 Statutes at Large, p. 209, making illegal contracts, combinations and conspiracies in restraint of trade or commerce among the several states and its supplements and amendments, petitioner being engaged in interstate trade.

The case involves a matter of sufficient general importance to justify a review.

4. The decision of the United States District Court, for the District of New Jersey was based upon the statute of New Jersey heretofore referred to and its construction by the New Jersey Court of Errors and Appeals in the New Jersey Painting Company case, and the effect is that the United States District Court in the instant case has permitted the application of a statute which, as construed by it, is offensive to the provisions of the 14th Amendment.

I.

The Circuit Court of Appeals erred in declining to consider the merits of the appeal because of its prior decision in Barker Painting Company vs. The Brotherhood, 15 Federal (2nd) 16.

The decision of the Circuit Court of Appeals in the case cited was on a review of a decree of a District Court of Pennsylvania declining to grant a preliminary injunction.

A consideration of the opinion will indicate that, in the last analysis, the Circuit Court of Appeals based its decision upon the rule that preliminary injunctions will not go unless the right is clear both upon the law and the fact. In its opinion it devoted considerable space to refer-

ence to reasons which *might* be advanced by the union in justification of the rule expressly stating that it did not do so to intimate any sympathy with the rule "for assuredly we have none."

That there is a distinction with respect to the amount and kind of proof which will induce a court to grant a permanent injunction after a full hearing and that which will induce a court to grant a preliminary injunction after a hearing only upon affidavits almost goes without saying.

The distinction is, I think, as well drawn as anywhere in *New Idea Pattern Co.* v. *Whitner*, 215 Pa. 193, 64 Atl. 518, at p. 520:

> "A preliminary injunction is not, however, to be granted where the plaintiff's right to it is in doubt. 1 Spelling, Extraordinary Relief, sec. 20; Black Lick Mfg. Co. *v.* Gas Co., 139 Pa. 448, 454, 21 Atl. 432; Waring *v.* Cram, 1 Pars. Eq. Cas. 516. The refusal of it does not repudiate the plaintiff's rights if he can ultimately establish any; it merely denies him an extraordinary remedy properly applicable only to cases in no respect equivocal; Daizell *v.* Crawford, 1 Pars. Eq. Cas. 37, 46."

An application was made in *Barker Painting Co.* v. *The Brotherhood,* 15 Fed. (2nd) 16, to this court for a certiorari, which was denied, 273 U. S. 748; 71 L. Ed. 872. It is impossible, of course, for counsel to know why it was denied, but it may well have been, the application being for a preliminary injunction, heard upon affidavits, that it was conceived that, if the matter was to be reviewed, it should be after a final hearing, with full opportunity to both sides to adduce all the proofs possible. The decree in the case at bar followed such a hearing.

II.

The Circuit Court of Appeals erred in declining to consider the merits because the particular work of petitioner, which had been interfered with, had been completed under the protection of a temporary injunction.

The Circuit Court of Appeals misapprehended the purpose of the bill. It was aimed at the conspiracy to interfere with *any* work of petitioner throughout the country on which petitioner did not pay the wage scale of his home town or of the place in which the work was being done, whichever was the higher. The International Union had adopted a resolution directing the enforcement of its rule which required such a wage scale to be paid and to enforce that rule its representatives threatened to interfere with *any* work upon which the rule was not being observed. The bill alleged, and the proofs showed, that the painting industry in New York, northern New Jersey, Connecticut and Pennsylvania was so unionized, and all other branches of the building industry in the territory were so unionized, and the agreements between the different branches of the industry were such, as that no painting work could be performed except by union labor for if it was so performed all other branches of the industry would withdraw from the building and it could never be completed and that a contractor could not be "fair" in one place and "unfair" in another, and if he employed non-union labor on one job all of his jobs, whether manned exclusively by union labor or not, would be struck throughout the country, and all trades would withdraw from any building job anywhere in the country upon which he was employed.

The National Union had notified all contractors by letter of December 5, 1921, Exhibit P. 4, p. 156, that the rule would be enforced. The bill alleged, and the proofs showed, that such an enforcement of the rule would re-

strict work to contractors local to the territory in which the work was being performed.

The actual interference by the union with the work of petitioner on the hospital in Somerville was alleged and proven only as indicating that the union meant what it said and as proof of the kind of interference which would be resorted to.

In *Bedford Cut Stone* v. *Journeymen S. C. Asso.*, 274 U. S. 37, at p. 54, and 71 L. Ed. 916, at p. 924, this court said:

> "The record does not disclose whether petitioners at the time of bringing suit had suffered actual injury; but that is not material. An intent to restrain interstate commerce being shown, it is enough to justify equitable interposition by injunction if there be a dangerous probability that such injury will happen; and this clearly appears."

And this court quoted among other cases *Thompson Machine Co.* v. *Brown,* 89 N. J. E. 326-328; 104 Atl. 129, in which case the Court said:

> "If the threats, open and implied, of the various users of the machinery and workers thereon, are carried out, there will, unquestionably, be injury. This court does not wait until there is actual injury; it protects against anticipated injury."

In *Vicksburg Waterworks* v. *Vicksburg,* 185 U. S. 66, at p. 82, 46 L. Ed. 808, at p. 816, this court said:

> "It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable."

III.

The District Court erred in dismissing the bill and the Circuit Court of Appeals for the Third Circuit erred in affirming for the reasons that (a) The conduct of defendants is a boycott, the result of a conspiracy, illegal at common law; (b) The rule is unreasonable and the classification bears no reasonable relation to the wage scale and the attempt of the unions to enforce the rule by combination is unlawful and a violation of the rights of petitioner; (c) The combination is in unfair restraint of trade, inimicable to public welfare and in violation of the public policy both of the State of New Jersey and of the United States and the combination and conspiracy is denounced by the Act of July 2, 1890, Chapter 746, 26 Statutes at Large, p. 209, making illegal contracts, combinations and conspiracies in restraint of trade of commerce among the several states, and its supplements and amendments, petitioner being engaged in interstate trade.

THE CASE INVOLVES A MATTER OF SUFFICIENT GENERAL IMPORTANCE TO JUSTIFY A REVIEW.

I will not attempt to argue the merits to any great extent. That there are merits to be argued is demonstrated by the facts that: up until the time of the decision of the Circuit Court of Appeals in the prior case, the *Barker Painting Company* v. *The Brotherhood,* 15 Fed. (2nd) 16, as stated by the court in that opinion, the State decisions were against the awarding of an injunction restraining the enforcement of the rule while the Federal decisions were contra; the Vice-Chancellor, in *New Jersey Painting Co.* v. *Local No. 26,* 95 N. J. E. 108; 122 Atl. 622, in a well-reasoned opinion, held that an injunction should go and it was necessary, in reversing, for the Court of Errors and Appeals of New Jersey, 96 N. J. E. 632; 126 Atl. 399, to overrule its prior decision in *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.,* 77 N. J. E. 219; 79 Atl. 262,

which had been taken as settled law, and to construe a statute of New Jersey in such a way as to make it offensive to the provisions of the 14th Amendment to the Constitution; the vote in the Court of Errors and Appeals was ten to five, with a short but vigorous and well-reasoned dissent by Judge White, p. 203; the Circuit Court of Appeals both in its prior decision in *Barker Painting Co.* v. *The Brotherhood*, 15 Fed. (2nd) 16, and in its decision in the present case, 34 Fed. (2nd) 3, addendum to the record, expressed its lack of sympathy with the rule, its "mental disturbance" and its more than gladness to have the case passed upon by the higher court, reaching its conclusion only because it felt that it was "constrained" to do so; Judge Buffington dissented in the first case and did not sit in the second.

The argument here will be confined to an attempt to indicate that the matter is of sufficient general importance to justify a review by this court.

The far-reaching effect of the adjudication that the union may enforce this rule by strikes, combinations and boycotts, cannot be over-estimated. If this union can promulgate such a rule and enforce it, *all* unions may do the same, and they may, in combination, enforce their respective rules with the result that labor may dictate what employers shall be permitted to perform work in certain localities. If a discrimination can be based upon the place of the employer's main office, it may be based upon whether the employer is an individual, corporation or partnership, and upon the amount of invested capital and upon the net worth and upon the return which the employer has been able to make upon his investment. I submit that no such power can be permitted to exist in any group or groups of men without the destruction of the fundamental principles upon which this government is founded—equality of opportunity.

The Circuit Court of Appeals for the Third Circuit in its opinion in *Barker Painting Co.* v. *The Brotherhood,* 15 Federal (2nd) 16 indicated its lack of sympathy with the rule and also pointed to the divergent holdings in the State and the Federal courts upon the validity of the rule. In its opinion in this case it confessed its "mental disturbance" in reaching the conclusion it had in the first case, and it stated that it would be more than satisfied to have this controversy between employer and organized labor finally decided by the higher court.

And Judge Buffington dissented in the first case.

The Vice-Chancellor in *New Jersey Painting Co.* v. *Local No. 26,* 95 N. J. E. 108; 122 Atl. 622, used vigorous language in coming to the conclusion that an injunction should go against the enforcement of the rule. He said:

> "That the operation of the amendment would be in unlawful restraint of trade is too obvious to require extended discussion. Its effect would be practically to bar a foreign contractor, ruled as he is by the higher union wage scale at his place of business, from successfully competing with a local contractor, for, in bidding, he would necessarily have to estimate on the basis of his home wage scale as against the local contractor's bid at the local and lower scale. This, manifestly, would destroy fair and honest competition. In the instant case it operates to the injury of a citizen of another state, and the union seeks to do, in effect, what the states are forbidden to do by the United States Constitution."

The New Jersey Court of Errors and Appeals in the same case 96 N. J. E. 632; 126 Atl. 399, based its decision upon the statute of New Jersey, P. L. 1883, p. 36; 3 Comp. Stat. of N. J., p. 3051, sec. 128, reading as follows:

> "that it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination

for or against leaving or entering into the employment of any person, persons or corporation."

Five judges of the New Jersey Court of Errors and Appeals dissented, and Judge White, in his dissenting opinion in 126 Atl. at p. 403, said: (not officially reported)

"The place of residence of the contractor is not in any way germane to the wage scale he should be required to pay. If he attempts to do work where there is no established wage scale, his employees or their organization for them, may fix the wages at which they are willing to work and he cannot complain; but where, as here, his employees' organization has fixed the wage scale for the locality involved, they may not, it seems to me, boycott him by providing that because he does not personally live in that locality, but, as here, lives in some other city or state, he shall because of that reason alone be required to pay a higher wage scale. The place of residence of the contractor not being germane to the subject of the wage scale he may be required to pay, any discrimination made against him founded upon such place of residence alone is in principle a boycott, and is unlawful."

"This principle was thought so important by the framers of our Federal Constitution that they provided in that instrument against any such discrimination by any state against the citizens of any other state, and it seems to me a curious condition which, while denying to the sovereign states themselves this privilege of invading the equal rights of the citizens, should accord such right of invasion to the Star Chamber Ex parte Committee which met in Dallas, Texas, in the year 1922, and promulgated the rule here in question for the government (under penalty of strike) of all the citizens of all of the states."

In reaching its conclusion that the statute permitted the enforcement of such a rule as this by strikes, etc., the Court of Errors and Appeals of New Jersey overruled its prior decision in *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.*, 77 N. J. E. 218; 79 Atl. 262 and construed the

statute in such a way as to render it offensive to the provisions of the 14th Amendment to the Constitution of the United States.

The case is of so much general importance as to merit a review by this court.

IV.

The decision of the United States District Court was based upon the statute of New Jersey heretofore referred to and its construction by the New Jersey Court of Errors and Appeals in the New Jersey Painting Company case and the effect is that the United States District Court in the instant case has permitted the application of a statute which, as construed by it, is offensive to the provisions of the Fourteenth Amendment.

In *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.*, 77 N. J. E. 219; 79 Atl. 262, in an opinion by the Chancellor, Mahlon Pitney, later a Justice of this Court, the New Jersey Court of Errors and Appeals, said:

> "In Mayer *v.* Journeymen Stonecutters' Asso., 47 N. J. E. (2 Dick) 519, 531, Vice-Chancellor Green apparently treated this act as legalizing private injuries. And in Cumberland Glass Manufacturing Co. *v.* Glass Bottle Blowers' Asso., 59 N. J. E. (14 Dick) 49, 53, Vice-Chancellor Reed construed it as permitting the adoption of peaceable measures for inducing workmen to quit or to refuse to enter an employment. Whatever may have been the purpose of its framer, there are, as we think, constitutional obstacles in the way of giving the act so extensive a force. The rights of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness, are declared by our Constitution to be unalienable. N. J. Const. art. I, pl. 1. No act of the Legislature is to be construed as infringing upon these rights unless its language plainly and clearly requires such a construction. If

its language so reads, it is to the extent indicated unconstitutional and void. The act of 1883, is as we think, properly to be treated as merely rendering the combination no longer indictable; in effect, as repealing the rule laid down by the Supreme Court of this State in State *v.* Donaldson, 32 N. J. Law (3 Vr.) 151. It does not legitimize an invasion of private rights nor prevent the party injured from having full redress."

Since the decision of the New Jersey Court of Errors and Appeals in *Brennan* v. *United Hatters,* 73 N. J. L. at p. 744, 65 Atl. 165, opinion also written by Justice Pitney and the decision of the same Court in *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.,* 77 N. J. E. 219, 79 Atl. 262, also written by Mr. Justice Pitney (then Chancellor), in view particularly of the dissenting opinion of Mr. Justice Minturn which succinctly set forth the effect of the decision as to the statute, it was considered by the Bar that the matter was settled in the State of New Jersey and that, as stated in the Jonas Glass Co. case, the statute could not be given any such wide scope as the New Jersey Court of Errors and Appeals gave it in *New Jersey Painting Co.* v. *Local No. 26,* 96 N. J. E. 632, 126 Atl. 399, and that:

"The act of 1883 is, as we think, properly to be treated as merely rendering the combination no longer indictable; in effect, as repealing the rule laid down by the Supreme Court of this State in State *v.* Donaldson, 32 N. J. L. 151. It does not legitimize an invasion of private rights nor prevent the party injured from having full redress. Its proper scope is indicated in the opinion of Vice-Chancellor Pitney in Frank & Dugan *v.* Herold, 63 N. J. E. 443, 447, 448."

The decision of the Court, upon that point, was dissented to by but one judge, Mr. Justice Minturn. Three other judges dissented from the result but not from that part of the opinion having to do with the scope of this statute.

The opinion in *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.*, 77 N. J. E. 219, relied upon and cited with approval *Barr* v. *Essex Trades Council*, 53 N. J. E. 101, 30 Atl. 881; *Brennan* v. *United Hatters*, 73 N. J. L. 729, 65 Atl. 165.

This court has cited with approval the case of *Barr* v. *Essex Trades Council*, 53 N. J. E. 101, 30 Atl. 881, in *Truax* v. *Corrigan*, 257 U. S. 311, 320, 66 L. Ed. 255, and it cited, with approval, *Brennan* v. *United Hatters*, 73 N. J. L. 729, 65 Atl. 165, in *Hitchman* v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260, and both *Barr* v. *Essex Trades Council* and *Brennan* v. *United Hatters* were cited with approval in *International News Service* v. *Associated Press*, 248 U. S. at page 213, 63 L. Ed. 211.

If the New Jersey statute is to have the construction put upon it by the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26*, 96 N. J. Eq. 632, 126 Atl. 399, and by the District Court in the case at bar, then it is offensive to the 14th amendment under the decision of this court in *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 255. In that case there came before this court the refusal of the Supreme Court of the State of Arizona to grant an employer an injunction against a conspiracy and boycott, one of the concomitants of the conspiracy and boycott being picketing. The Supreme Court of Arizona rested its decision upon a statute of Arizona which, as construed by the Supreme Court of Arizona, prevented the court from prohibiting picketing so long as peaceful, and, as the Chief Justice of this Court said in delivering the opinion of this Court:

> "The effect of this ruling is that, under the statute, loss may be inflicted upon the plaintiffs' property and business by 'picketing' in any form if violence be not used, and that, because no violence was shown or claimed, the campaign carried on, as described in the complaint and exhibits, did not unlawfully invade complainants' rights."

This court held that the statute was unconstitutional both as a taking of property without due process of law and a denial of the equal protection of the law. It said:

> "The opinion of the State Supreme Court in this case, if taken alone, seems to show that the statute grants complete immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful. • • •"
>
> "It is argued that while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the State for maintaining peace, good order and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the State may withdraw all protection to a property right by civil or criminal action for its wrongful injury, if the injury is not caused by violence."

This Court held that, if the statute should be construed as merely to withhold from the parties a remedy through the equitable relief of injunction, it was void as denying the equal protection of the law.

This Court said that the classification of employers in the manner created by the statute was illusory, and

> "Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world, and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended —its very purpose was—to prevent experimentation with the fundamental rights of the individual. We said through Mr. Justice Brewer, in Muller *v.* Oregon, 208 U. S. 412, 52 L. Ed. 551, 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking." • • •

> "It seems a far cry from classification on the basis of relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so, in respect of torts thereafter committed by such ex-employees, on the business and property right of the employer. It is really a little difficult to say, if such classification can be sustained, why special legislative treatment of assaults upon an employer or his employees by ex-employees may not be sustained with equal reason. It is said the State may deal separately with such disputes because such controversies are a frequent and characteristic outgrowth of disputes over terms and conditions of employment. Violence of ex-employees toward present employees is also a characteristic of such disputes. Would this justify a legislature in excepting ex-employees from criminal prosecution for such assaults, and leaving the assaulted persons to suits for damages at common law?"

The dissenting opinion of Mr. Justice Holmes, in which he says:

> "By calling a business 'property' you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed."

indicates to what extent the prevailing opinion went.

In conclusion I submit to your Honors that if unions are permitted to use the weapon of the strike to enforce a discrimination such as is here involved, merely because that discrimination has to do with the matter of wages, however arbitrary the classification may be, then it will not be difficult to devise means whereby, under the law, the business fabric of the country can be torn apart and the present social system completely destroyed; that if discrimination of this kind is permitted by combinations of labor unions employers must be accorded the same

right as against labor unions, for, as this court said
Coppage v. *Kansas*, 236 U. S. 18, 59 L. Ed. at p. 448:

> "And can there be one rule of liberty for the l
> bor organization and its members, and a differe
> and more restrictive rule for employers?"

Employers, therefore, must be permitted to combine
discriminate against employees upon any conceivab
ground, however arbitrary.

Instead of a government of law, in which each man
free, enjoying equal rights with his fellows, we will ha
a government of labor unions and combinations of e
ployers.

Upon these grounds it is urged that a writ of cer
orari should go as prayed.

Respectfully submitted,

MERRITT LANE,
Attorney for and of Counsel with
Barker Painting Company.

FILE COPY

APR 21 19

IN THE

Supreme Court of the United States

No. 477. October Term, 1929.

BARKER PAINTING COMPANY,
Petitioner,

and

LOCAL No. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, *et als.*,
Respondents.

BRIEF OF PETITIONER.

Plaintiff Below

MERRITT LANE,
Attorney for and of Counsel with Petitioner.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

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Supreme Court of the United States

BARKER PAINTING COMPANY, *Petitioner,* *and* LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, *et als.,* *Respondents.*	*On Certiorari.* *No. 477 October Term, 1929.*

BRIEF OF PETITIONER.

(Italics mine except where otherwise noted.)

I.

The Opinions Below.

This case is here on certiorari granted December 9, 1929 (p. 169) U. S. Supreme Court Advance Opinions, No. 4, p. 135, 74 L. Ed. 135, to review a decree of the Circuit Court of Appeals for the Third Circuit, filed August 12, 1929 (p. 168) affirming a decree of the District Court for the District of New Jersey, filed March 28, 1928 (p. 33), dismissing plaintiff's bill in equity. The opinion of the District Court, the court of first instance, is reported in 12 Federal 2nd, 945, and is printed p. 20 of the record. The opinion of the Circuit Court of Appeals is reported in 34 Federal 2nd p. 3, and is printed p. 165 of the record.

II.

Jurisdiction.

The jurisdiction of this court is rested on section 240 of the Judicial Code, as amended by the act of February 13,

1925, sec. 1, 43 Statutes 938, sec. 347, title 28, U. S. C. A. p. 359.

The jurisdiction of the District Court was rested upon: diversity of citizenship; that the statute of the State of New Jersey, entitled: "An act relative to persons combining and encouraging other persons to combine," P. L. 1883, p. 36, 3 C. S. of N. J. p. 3051, which reads as follows:

> "That it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any persons, person or corporation."

as construed by the highest court of the State, is repugnant to the 14th amendment to the constitution of the United States in that its effect is to deprive petitioner of property without due process of law and to deny it the equal protection of the law; that the defendants are engaged in a conspiracy in violation of Section 1, U. S. C. A. Title 15, p. 4, Act of July 2, 1890, c. 647 Sec. 1 26 Stat. 209 (Sherman Anti Trust Act) and p. 148, Sects. 12, 13, 14, 15, 16 and 17 U. S. C. A. Title 15, Act of Oct. 15, 1914, c. 323, 38 Stat. 730 (Clayton Act).

III.

STATEMENT OF THE CASE.

Resume of the Facts.

The bill alleged, and the proof on final hearing showed that: petitioner employed exclusively union labor, operating closed union shop; petitioner on November 8, 1924, took a contract from the general contractor for the painting work on a hospital in Somerville, Somerset County, New Jersey; the contract provided that the work should be

performed as required by the progress of the job; petitioner proceeded, employing help all local to Somerville except the foreman; it complied with all union conditions as to hours and wages, etc. for the territory in which Somerville is located; the work proceeded from December 7, 1924, to February 21, 1925, with all of the men satisfied; on February 21, 1925, George W. Hoffman, the business agent of Local No. 734, not a painter but acting also for the Building Trades Council having jurisdiction in Somerville, that council being made up of delegates from various building trades unions, instructed by Harry S. Warren the state organizer of the National union, insisted that petitioner pay the wage scale of New York, its home town, which was higher than that for Somerville, and threatened that, if it did not, the employees of petitioner would be directed not to work; petitioner refused; the men were directed to cease work and did so although satisfied with their wages, hours and working conditions; they ceased only because they feared, if they continued at work, that they would be expelled from the union and thereby deprived of earning a livelihood, the industry being, in effect, 100 per cent. unionized; the painting industry and all other branches of the building industry in New York, northern New Jersey, Connecticut and Pennsylvania are so unionized, and the agreements between the different branches of the building industry are such, as that no painting work can be performed except with union labor, for if it were so performed, all other branches of the building industry would withdraw from the building and it could never be completed; a contractor cannot be "fair" in one place and "unfair" in another and if he employs non-union labor on one job all of his jobs throughout the country whether manned exclusively with union labor or not, will be struck and all building trades will withdraw from any job upon which he is engaged anywhere in the country; the National union threatened to compel petitioner and all other painting contractors to comply with the rule by strikes and boy-

cotts; the effect of the rule and its enforcement at the time of the trial had been such as that painting contractors of New York could not take work in New Jersey; the business is highly competitive and the effect of the rule, if enforced, will be to limit all painting work to local contractors.

The foregoing is a summary of the facts.

Further Consideration of the Facts.

In his answer to the petition for certiorari and his brief counsel for respondents questioned some of these statements which makes it necessary to refer to the record.

The substance of the rule, the enforcement of which the bill seeks to prevent, is stated in the bill paragraph second 7, p. 9, admitted by the answer paragraph 5, p. 18, and in the opinion of the District Court, p. 21, as follows:

> "Where there is a difference between the wage scale of two cities all members employed upon a job in one of the two cities by an employer from the other (whether sent from the city in which the employer's place of business is situated or hired in the city where the work is done) shall receive the higher of the two wage scales."

This rule was supplemented by another which provides that upon any job performed by an outside employer at least 50 per cent. of the employees engaged on such job shall be hired from the locality in which it is being performed (Bill, par. 12, p. 12; Answer, par. 8; Rule 62, Exhibit D. 1, p. 157).

There are elaborate provisions in the constitution of the Brotherhood for clearance cards, etc., so that no member can go from one locality to the other without the consent of the Local having jurisdiction in the place in which the work is to be done and for implicit obedi-

ence of every member with every rule and for fine and expulsion for violation of a rule (Sec. 133, p. 148; Sec. 271, 274, p. 151).

In the States of New York, Pennsylvania, New Jersey and Connecticut the painting industry, and the building industry as a whole, is practically 100 per cent. unionized (Rosenthal, p. 43; Hass, p. 62; Kelley, p. 60; Joseph F. Kelley, p. 130); it is impossible to complete a building without the use of union labor (Rosenthal, p. 43; Kelley, p. 60; Hass, p. 62); there is an understanding, sometimes expressed in rules where there are district councils which take into their memberships representatives of the various unions controlling labor in different branches of the building industry, to the effect that, if any work is performed upon a building by non-union labor in one trade, the other trades will do no work upon the building (Warren, pp. 89 to 91; Rosenthal, p. 47; Hoffman, p. 74); a contractor cannot be fair in one place and unfair in another so that, if in one locality he employs non-union labor, union labor will not work for him in another nor will the union labor work upon buildings upon which he has a contract in other localities (Warren, p. 91; Rosenthal, p. 44; Hass, p. 62); *the rules of the Union have the force of law* (Landow, p. 79; Joseph F. Kelley, p. 137); it is impossible for a contractor to pay more than the local rate for union painters in the locality in which the work is being done, labor representing 65 per cent. of the cost of contracting painters (Mackay, p. 98; Rosenthal, p. 44; Kelley, pp. 59, 61; Hass, p. 62), and still continue in business.

There is a contention by defendants that, painting contractors in bidding figure on the wage scale of their "home cities" if that scale happens to be the higher, but there is no evidence of probative value to support the contention.

The evidence relied upon by defendants is that of Joseph F. Kelley (Second General Vice-President of the union) (pp. 107, 110), but see his cross examination (pp. 119, 121, 123, 124); Warren (p. 86, but see his cross examination (p. 92); Landow, p. 77); all of whom are officials of the Union and who, the testimony demonstrates, know nothing about it, whereas the testimony of Rosenthal (p. 42); Hass (p. 62); John S. Kelley (p. 60) and Mackay (p. 98), all contracting painters, the three latter having no connection with plaintiff, is to the contrary.

Plaintiff, Barker, had a contract for the painting and decorating work on the Somerset Hospital, Somerville, New Jersey, dated November 8, 1924 (Exhibit P. 1, p. 143); it commenced work late in January, 1925, starting with a couple of men and running up to about six (p. 44); the union rate at the "home city" of plaintiff was $10.50 for an eight-hour day (p. 44); the union rate in Somerville, New Jersey, was $8.00 per day; plaintiff operated a closed union shop, as it *must* to do any business and it employed exclusively union men (p. 44); the work progressed for several weeks, when it was stopped because of the refusal of plaintiff to pay the New York wage to local men (p. 44); the work was about thirty per cent. complete and its condition was such as that it was necessary that it should be forthwith prosecuted so as not to interfere with the completion of the building; the work was figured by plaintiff upon the local rate (p. 48);

Arthur P. Demaray (p. 49), Thomas Winsor (p. 52), and Joseph Housh (p. 56), employees of plaintiff who ceased work, were called by plaintiff and the effect of their testimony as to why they quit is well expressed by Demaray, who says that George W. Hoffman, who is the Business Agent, representing the Somerville Building Trades Council, which is composed of carpenters, plumbers, electricians, painters and laborers (p. 66), came upon

the job and said: "You fellows can't continue here; you will have to let today be your last," and by Housh, when he said (p. 56) that Hoffman came on the job and said to the men "I will have to pull the job, you fellows are entitled to ten dollars and fifty cents and you can't come back until it is settled and they pay ten dollars and fifty cents a day."

These employees were perfectly satisfied with the wage which they were receiving and, after the temporary injunction had been granted, Winsor and Housh went back to work.

The control of the union representatives over the men is well indicated by the statement of Winsor (p. 54) that he went back because he couldn't "find anybody to tell me not to go back to work." Demaray, who did not go back to work for plaintiff after the injunction, says that he was content with his wages, hours and working conditions and that the only reason why he quit was that *Hoffman told him to.*

Hoffman went on the job at the time he stopped it after a conferene with Warren, General Organizer of the Brotherhood, with the purpose and intent of preventing the work being prosecuted unless the rules were complied with (Hoffman, pp. 66, 67).

The Claimed Justification for the Rule.

The alleged justification for the rule, from an economic standpoint, is found in the testimony of Warren (p. 87); Landow (p. 76); Joseph F. Kelly (p. 112). Were the reasons stated founded on fact, they would not be sufficient *to justify a combination* to enforce such a rule so interfering with the natural rights of the employer, the builder and the public desiring to erect houses, by coersion.

Substantially the reasons given by the unions were that employers were in the habit of employing partly foreign and partly local employees and paying the local rate to the local employees and the foreign rate to the foreign employees, which created friction and that the foreign employer always figured upon the rate prevailing at the place of his main office.

It is hard to say, from the testimony, what the claimed justification for the action of the Brotherhood is. While it is *suggested* that there is a justification because of friction which had occurred prior to the enforcement rule there is an indefiniteness in the testimony offered which indicates quite clearly that it was *not* the *real* reason.

It would seem from the testimony of Joseph F. Kelly, (Second General Vice-President of the union) that the *real* reason for the adoption of the rule was that certain of the Brotherhood members *thought* that employers, who came from a foreign district, figured their jobs upon the foreign rate (pp. 112-117). The witness testified—

> "A Yes, sir; some of the things that I advanced were advanced on the floor of the assembly. One, in *particular* was the fact that in a number of instances the higher rate was estimated on and for that reason the delegates that were advocating the higher rate advanced that as their reason for this change in our constitution."

Again, when asked to summarize the reasons for the rule:

> "I thought I explained those early in the affair. Of course, I said that the reasons advanced were on account of the members knowing and believing that all this work was estimated at the higher rate, and again for to keep down the friction that would exist where there were two scales of wages."

There is no probative evidence of any friction sufficient to justify the rule. It is stated by the Brotherhood that

the rule had been in existence for upwards of fifteen years, but if it was, it was not enforced until after the Dallas convention in 1921, after which the letter of December 5, 1921, Exhibit P. 4, p. 156, was sent by the Brotherhood to contractors directing their attention to the action of the Dallas convention, and advising them that they should be guided accordingly.

If the friction existed it was easily susceptible of proof and the lack of definite proof must be taken as an indication that it did not exist. The rule that where testimony is within the control of a party and not produced, the inference is against the existence of the fact alleged applies.

> 22 *Corpus Juris*, title "Evidence," sec. 24, p. 81; sec. 55, sec. 56, p. 115;
>
> *United States, ex rel. Vajtauer* v. *Comr. of Immigration*, 273 U. S. 102 (1926), 71 L. Ed. 561, at p. 565;
>
> *Runkle* v. *Burnham*, 153 U. S. 217, 38 L. Ed. 694 at p. 697 (1894);
>
> *Kirby* v. *Tallmadge*, 160 U. S. 379, 40 L. Ed. 463 (1895).

It is passing strange, that if there were any such friction as is suggested, the industry could have been continued with harmony for fifteen years with this rule in existence and *not enforced.*

And so with the other claimed justification for the rule, *i. e.*, that contractors always figure upon the higher wage rate. Defendants here contented themselves with the production of the testimony of Landow (p. 77); Warren (p. 86); Joseph F. Kelly (pp. 112, 116), officials of the union or its locals, who really know nothing about the matter and their statements are opposed to those of Rosenthal, Hass, Mackay and John S. Kelly, who are general contractors and who *do* know and, here, too, if the fact existed, it was easily susceptible of proof.

That the Brotherhood itself did not consider its claim that the so-called national contractors figured on the higher rate as well founded is indicated by the testimony of Joseph F. Kelly (Second General Vice-President of the union). He had testified on his direct examination that contractors who had contracts before the rule went into effect were permitted to operate under the old rule. On cross examination (p. 119) he is asked to explain why it would be unfair to enforce the rule as to contracts already made if it were true that contractors figured on the higher wage scale and he is at a loss for an explanation which explains.

In any event as a remedy for the friction the rule goes much too far. It requires that the foreign employer pay the higher rate whether the employees are *all local men*, or whether they are *all foreign men*. It does not seek to base the discrimination *upon difference of residence of the employees*. It makes a discrimination arbitrarily upon the basis of the place of the main office of the employer.

Joseph F. Kelly cannot give any reason for the discrimination against foreign contractors *who employ all local labor*. He testified page 127:

> "Q Do you know of any reason why if the New York contractors or the national contractor employs all local men the local rate should not be paid? A Do I know any reason where a national contractor pays a local rate or—
>
> Q No. Do you know of any reason why a national contractor who employs all local men that the local rates should not be paid—why the local rates should not be paid? A For the reasons that I have given in saying why this amendment was enacted into our law. I testified to it.
>
> Q It cannot be for all of them because I have eliminated the friction. I am assuming that the national contractor employs all local men. What is the reason why he should pay the home rate? A Well, for the reason that has been advanced, as I

testified to, because of the fact that he generally estimates to pay it and on account of the efficiency that he can get by these local men on the job by the advance in the price."

The testimony of Mackay (p. 98) (painting contractor) is to the effect that the so-called national contractors as a rule employ *all local help* sending only their charge men and the effect of the testimony of Joseph F. Kelly (Second General Vice-President of the union) taken as a whole, is not to the contrary. The charge man in the painting industry is equivalent to a foreman (p. 127).

On page 107 Joseph F. Kelly (official of the union) says:

"A Invariably I would say that they (the national contractors so-called) charge more. I might explain that my reasons for that is that in mostly all instances they have to send their charge men and in a number of cases they have to send their material, their scaffolding and their appliances, and the men that they send generally have to get their board and their expenses, and that is where my knowledge would come in of those contracts being charged at a greater sum."

Now, in addition to *these* extra expenses which the foreign contractor must bear in competition with the local contractor, the Brotherhood desires to add another arbitrary additional expense, to wit, an increase in wages over and above what the local contractor must pay.

In its last analysis, so far as justification is concerned, it comes down to the answer to the question *"Is the locality in which the contractor may have his main office a sufficient ground for discrimination against him with respect to price of labor?"* The question answers itself. And the answer was put in words by Judge White in his dissenting opinion in *New Jersey Painting Company* v. *Local No. 26, etc.*, 96 N. J. E. 632, reversing 95 N. J. E. 108, the dissenting opinion of Judge White being reported in 126 Atl. at p. 403 (not officially reported), four judges

of the Court of Errors and Appeals of New Jersey dissenting.

Even if there were friction in certain cases and even if certain contractors figured on the wage scale of their home city (how they could do this and compete is not disclosed) the unions would not be justified in putting a rule such as this into effect. The fact that there is an evil to be remedied does not justify every method that can be thought of to remedy it. Many ills must be borne. Undoubtedly there is friction among employers because of competition and a sure cure is a combination to prevent competition but that is not permitted because of its effect on others than employers. So, here, if there is friction, a combination, the result of which is injury to employers and to the public, will not be permitted to eliminate that friction.

Specification of Errors.

The assignments of error in the Circuit Court of Appeals are found in the record, p. 36. They are 19 in number but are so numerous only that constitutional questions involved may be properly raised. The case may be argued under four heads:

1. The Circuit Court of Appeals erred in declining to consider the merits of the appeal because of its prior decision in *Barker Painting Company* v. *The Brotherhood*, 15 Fed. (2nd) 16.

2. The Circuit Court of Appeals erred in declining to consider the merits because the particular work of plaintiff which had been interfered with had been completed under the protection of a temporary injunction.

3. The District Court erred in dismissing the bill and the Circuit Court of Appeals erred in affirming for the reasons that (a) The conduct of defendants is a boycott, the result of a conspiracy, illegal at common law; (b)

The rule is unreasonable and the classification bears no reasonable relation to the wage scale and the attempt of the unions to enforce the rule by combination is unlawful and a violation of the rights of plaintiff; (c) The combination is in unfair restraint of trade, inimicable to public welfare and in violation of the public policy both of the State of New Jersey and of the United States and the combination and conspiracy is denounced by the Act of July 2, 1890, chapter 746, 26 Statutes at Large, p. 209, Title 15, U. S. C. A. sec. 1, p. 4, making illegal contracts, combinations and conspiracies in restraint of trade or commerce among the several states, and its supplements and amendments, plaintiff being engaged in interstate trade.

4. The decision of the District Court was based upon the statute of New Jersey heretofore mentioned and its construction by the New Jersey Court of Errors and Appeals in the New Jersey Painting Company Case, 96 N. J. E. 632; 126 Atl. 399, and the effect is that the District Court in the instant case has permitted the application of a statute which, as construed by it, is offensive to the provisions of the 14th amendment.

ARGUMENT.

I.

The Circuit Court of Appeals erred in declining to consider the merits of the appeal because of its prior decision in Barker Painting Company v. The Brotherhood, 15 Federal (2nd) 16.

The decision of the Circuit Court of Appeals in the case cited was on a review of a decree of a District Court of Pennsylvania declining to grant a *preliminary* injunction.

A consideration of the opinion will indicate that, in the last analysis, the Circuit Court of Appeals based its de-

cision upon the rule that preliminary injunctions will not go unless the right is clear bo upon the law and the fact. In its opinion it devoted considerable space to reference to reasons which *might* be advanced by the union in justification of the rule expressly tating that it did not do so to intimate any sympathy wit the rule "for assuredly we have none."

That there is a distinctionwith respect to the amount and kind of proof which wi induce a court to grant a permanent injunction after full hearing and that which will induce a court to grant preliminary injunction after a hearing only upon affidavitalmost goes without saying.

The distinction is, I thinkas well drawn as anywhere in *New Idea Pattern Co.* v. *Whitner*, 215 Pa. 193, 64 Atl. 518, at p. 520:

> "A preliminary injuction is not, however, to be granted where the plaintiff's right to it is in doubt. 1 Spelling, Extraordinary Relief, sec. 20; Black Lick Mfg. Co. *v.* Gas Co., 139 Pa. 448, 454, 21 Atl. 432, Waring *v.* Cram, Pars. Eq. Cas. 516. The refusal of it does not adjudiate the plaintiff's rights if he can ultimately establish any; it merely denies him an extraordinary remedy properly applicable only to cases in no respect equivocal; Dalzell *v.* Crawford, 1 Pars. Eq. Cas. 37, 46."

An application was maden *Barker Painting Co.* v. *The Brotherhood*, 15 Fed. (2nd 16, to this court for a certiorari, which was denied, 2 U. S. 748; 71 L. Ed. 872. It is impossible, of course, fo counsel to know why it was denied, but it may well hae been, the application being for a preliminary injunctio, heard upon affidavits, that it was conceived that, if the matter was to be reviewed, it should be after a final hering, with full opportunity to both sides to adduce all th proofs possible. The decree in the case at bar followed uch a hearing.

II.

The Circuit Court of Appeals erred in declining to consider the merits because the particular work of plaintiff, which had been interfered with, had been completed under the protection of a temporary injunction.

The Circuit Court of Appeals misapprehended the purpose of the bill. It was aimed at the conspiracy to interfere with *any* work of plaintiff throughout the country on which plaintiff did not pay the wage scale of its home town or of the place in which the work was being done, whichever was the higher. The International Union had adopted a resolution directing the enforcement of its rule which required such a wage scale to be paid and to enforce that rule its representatives threatened to interfere with *any* work upon which the rule was not being observed. The bill alleged, and the proofs showed, that the painting industry in New York, northern New Jersey, Connecticut and Pennsylvania was so unionized, and all other branches of the building industry in the territory were so unionized, and the agreements between the different branches of the industry were such, as that no painting work could be performed except by union labor for if it was so performed all other branches of the industry would withdraw from the building and it could never be completed and that a contractor could not be "fair" in one place and "unfair" in another, and, if he employed non-union labor on one job, all of his jobs, whether manned exclusively by union labor or not, would be struck throughout the country, and all trades would withdraw from any building job anywhere in the country upon which he was employed.

The bill prayed, prayer 2, p. 16, for an injunction against the defendants *generally* from interfering with *any* work of plaintiff for the purpose of enforcing the rule, and, prayer 3, p. 17, for a decree that the rule may be

adjudged and declared illegal and void, and that all steps taken to enforce and put into effect the rule be adjudged and declared illegal and void.

The National Union had notified all contractors by letter of December 5, 1921, Exhibit P. 4, p. 156, that the rule would be enforced. The bill alleged, and the proofs showed that such an enforcement of the rule would restrict work to contractors local to the territory in which the work was being performed.

The actual interference by the union with the work of plaintiff on the hospital in Somerville was alleged and proven only as indicating that the union meant what it said and as proof of the kind of interference which would be resorted to.

In *Bedford Cut Stone* v. *Journeymen S. C. Asso.*, 274 U. S. 37, at p. 54, and 71 L. Ed. 916, at p. 924, this court said:

> "The record does not disclose whether petitioners at the time of bringing suit had suffered actual injury; but that is not material. An intent to restrain interstate commerce being shown, it is enough to justify equitable interposition by injunction if there be a dangerous probability that such injury will happen; and this clearly appears."

And this court quoted among others *Thompson Machine Co.* v. *Brown*, 89 N. J. E. 326-328; 104 Atl. 129, in which case the court said:

> "If the threats, open and implied, of the various users of the machinery and workers thereon, are carried out, there will, unquestionably, be injury. This court does not wait until there is actual injury; it protects against anticipated injury."

In *Vicksburg Waterworks* v. *Vicksburg*, 185 U. S. 66, at p. 82, 46 L. Ed. 808, at p. 816, this court said:

> "It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the con-

tract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable."

III.

The District Court erred in dismissing the bill and the Circuit Court of Appeals erred in affirming for the reasons that (a) The conduct of defendants is a boycott, the result of a conspiracy, illegal at common law; (b) The rule is unreasonable and the classification bears no reasonable relation to the wage scale and the attempt of the unions to enforce the rule by combination is unlawful and a violation of the rights of plaintiff; (c) The combination is in unfair restraint of trade, inimicable to public welfare and in violation of the public policy both of the State of New Jersey and of the United States and the combination and conspiracy is denounced by the Act of July 2, 1890, Chapter 746, 26 Statutes at Large, p. 209, Title 15, U. S. C. A., Sec. 1, p. 4, making illegal contracts, combinations and conspiracies in restraint of trade and commerce among the several states, and its supplements and amendments, plaintiff being engaged in interstate trade.

The effect of a decision sustaining the right of the Union to promulgate and enforce the rule here involved.

The far-reaching effect of the adjudication that the union may enforce this rule by strikes, combinations and

boycotts, cannot be over-estimated. If *this* union can promulgate such a rule and enforce it, *all* unions may do the same, and they may, in combination, enforce their respective rules with the result that labor may dictate what employers shall be permitted to perform work in certain localities. If a discrimination can be based upon the place of the employer's main office, it may be based upon whether the employer is an individual, corporation or partnership, and upon the amount of invested capital and upon the net worth and upon the return which the employer has been able to make upon his investment. I submit that no such power can be permitted to exist in any group or groups of men without the destruction of the fundamental principles upon which this government is founded—equality of opportunity.

The Circuit Court of Appeals for the Third Circuit in its opinion in *Barker Painting Co.* v. *The Brotherhood,* 15 Federal (2nd) 16 indicated its lack of sympathy with the rule and also pointed to the divergent holdings in the State and the Federal courts upon the validity of the rule. In its opinion in this case it confessed its "mental disturbance" in reaching the conclusion it had in the first case.

And Judge Buffington dissented in the first case.

The Vice-Chancellor in *New Jersey Painting Co.* v. *Local No. 26,* 95 N. J. E. 108; 122 Atl. 622, used vigorous language in coming to the conclusion that an injunction should go against the enforcement of the rule. He said:

> "*That the operation of the amendment would be in unlawful restraint of trade is too obvious to require extended discussion.* Its effect would be practically to bar a foreign contractor, ruled as he is by the higher union wage scale at his place of business, from successfully competing with a local contractor, for, in bidding, he would necessarily have to estimate on the basis of his home wage scale as against the local contractor's bid at the

local and lower scale. This, manifestly, would destroy fair and honest competition. In the instant case it operates to the injury of a citizen of another state, and the union seeks to do, in effect, what the states are forbidden to do by the United States Constitution."

The New Jersey Court of Errors and Appeals in the same case 96 N. J. E. 632; 126 Atl. 399, based its decision upon the statute of New Jersey, P. L. 1883, p. 36; 3 Comp. Stat. of N. J., p. 3051, sec. 128, reading as follows:

"that it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons or corporation."

Five judges of the New Jersey Court of Errors and Appeals dissented, and Judge White, in his dissenting opinion in 126 Atl. at p. 403 (not officially reported), said:

"*The place of residence of the contractor is not in any way germane to the wage scale he should be required to pay.* If he attempts to do work where there is no established wage scale, his employees or their organization for them, may fix the wages at which they are willing to work and he cannot complain; but where, as here, his employees' organization has fixed the wage scale for the locality involved, they may not, it seems to me, boycott him by providing that because he does not personally live in that locality, but, as here, lives in some other city or state, he shall because of that reason alone be required to pay a higher wage scale. *The place of residence of the contractor not being germane to the subject of the wage scale he may be required to pay, any discrimination made against him founded upon such place of residence alone is in principle a boycott, and is unlawful.*"

"This principle was thought so important by the framers of our Federal Constitution that they provided in that instrument against any such dis-

> crimination by any state against the citizens of any other state, and it seems to me a curious condition which, while denying to the sovereign states themselves this privilege of invading the equal rights of the citizens, *should accord such right of invasion to the Star Chamber Ex parte Committee which met in Dallas, Texas, in the year 1922, and promulgated the rule here in question for the government (under penalty of strike) of all the citizens of all of the states.*"

In reaching its conclusion that the statute permitted the enforcement of such a rule as this by strikes, etc., the Courts of Errors and Appeals of New Jersey overruled its prior decision in *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.*, 77 N. J. E. 218; 79 Atl. 262 and construed the statute in such a way as to render it offensive to the provisions of the 14th amendment to the Constitution of the United States as will be hereinafter argued.

The cases in which the challenged rule has been considered.

The first case was *New Jersey Painting Company* v. *Local No. 26, etc.*, in the Court of Chancery of New Jersey, 95 N. J. E. 108, 122 Atl. 622, in which Vice-Chancellor Backes held the demand of the Union unreasonable and discriminatory and said (p. 110):

> "*The assigned reason as a justification in law for the strike is manifestly without merit.* In its self-serving pursuit the union entirely overlooked the effect of its action upon trade, and the consequences to the employers of labor. It cannot be denied that the union may arbitrarily fix a uniform scale of wage applicable to all its members, or that it may *classify its members* and arbitrarily fix a uniform scale based on qualification, or that it may localize such uniform scale, and strike to enforce its demands, however oppressive they may be, and the strike will not be interfered with by the courts if it is lawfully carried on. The reason-

ableness or unreasonableness of the demands would not be regarded as a justifiable question, but one to be fought out by capital and labor by their own methods and with their own weapons. National Protective Association *v.* Cumming, 170 N. Y. 315; Bossert *v.* Dhuy, 221 N. Y. 342; Gill Engraving Co. *v.* Doerr, 214 Fed. Rep. 111. But it cannot be admitted that the union may, after having set up wage scales for its members in their various localities, and which employers of labor must abide by, and reckon with, *discriminate against employers, in the matter of wages, based upon the illusory ground that the employer is not local to the place of work.* Such discrimination would be in unfair restraint of trade, inimical to public welfare and in violation of public policy, and any attempt of the union to impose its will by the coercive means of strike would be *an unwarranted and unlawful exercise of the power of might.* The principle upon which the law interdicts such union activity has been often and clearly expounded by the courts. The authorities are numerous and illustrative. Some of them are: Gompers *v.* Buck Stove & R. Co., 221 U. S. 418; Berry *v.* Donovan, 188 Mass. 353; Pickett *v.* Walsh, 192 Mass. 572; Wilcutt & Sons *v.* Driscoll, 200 Mass. 110; Burnham *v.* Dowd, 217 Mass. 351; United Shoe Machinery Corp. *v.* Fitzgerald, 237 Mass. 537; Haverill Strand Theatre *v.* Gillen, 229 Mass. 413; L. R. A. 1918 C. 813; Grassi Contracting Co. *v.* Bennett, 160 N. Y. Supp. 279; Baldwin Lumber Co. *v.* International Brotherhood &c. 91 N. J. E. 240; Currier & Sons *v.* International Molders' Union, 93 N. J. E. 61; Lehigh Co. v. Atlantic S. & R. Works, *supra. That the operation of the amendment would be in unlawful restraint of trade is too obvious to require extended discussion.* Its effect would be practically to bar a foreign contractor, ruled as he is by the higher union wage scale at his place of business, from successfully competing with a local contractor, for, in bidding, he would necessarily have to estimate on the basis of his home wage scale as against the local contractor's bid at the local and lower scale. *This, manifestly, would de-*

stroy fair and honest competition. In the instant case it operates to the injury of a citizen of another state, and the union seeks to do, in effect, what the states are forbidden to do by the United States Constitution."

The next case was *Hass Inc.* v. *Local Union No. 17, etc.*, 300 Federal 894, in which, after referring to the rule and the injury which it would cause, conceding that there had been no threats of force, the court said:

> "That no threats of force have been used is immaterial, for threats of fine and expulsion from the defendant union are just as effectual as threats of force, where, as here, expulsion would mean the loss by the person expelled of the opportunity to make a living at his trade."
>
> "The injury thus inflicted on the outside contractor and the public cannot be justified, since no legitimate interest of the defendants would be furthered by the operation of the rule in question. *It was clearly designed for the sole purpose of excluding outside competition in the home market on the part of outside contractors*, and since the plaintiff has been injured by the operation of the rule he is entitled to an injunction enjoining the defendants from enforcing it. The same conclusion was recently reached by Vice-Chancellor Backes in New Jersey Painting Co. *v.* Local Union No. 26, Brotherhood of Painters, Decorators, Paper Hangers of America (N. J. Ch.) 122 Atl. 622, where the same rule was under consideration, as well as in Barker Painting Co. *v.* Brotherhood of Painters, Decorators and Paper Hangers of America, Supreme Court, District of Columbia, decided April 8, 1924."

The next case was *New Jersey Painting Co.* v. *Local No. 26, etc.*, in the Court of Errors and Appeals of New Jersey, 96 N. J. E. 632, 126 Atl. 399, reversing the same case below, 95 N. J. E. 108, 122 Atl. 622. Five judges of the Court of Errors and Appeals dissented—Justices Kalisch, Katzenbach, Lloyd and Judges White and Gardner. Judge White wrote a dissenting opinion, which is

reported in 126 Atl. 403 (not officially reported) and which, succinctly, states the principle for which I contend.

A careful consideration of Justice Black's opinion for the majority will indicate, I submit, that it is somewhat difficult to get at what the real theory of the court was. The learned justice, at great length, refers to the statute of 1883, p. 36, 3 C. S. of N. J. p. 3051, sec. 128, and indicates that the restriction put upon the language of that statute by the same court in *Jonas Glass Co.* v. *Glass Bottle Blowers Association*, 77 N. J. E. 219, 79 Atl. 262, was not proper, overlooking, that, if the restriction be removed, the statute is unconstitutional because it deprives an employer of labor of his property without due process of law and of the equal protection of the law, guaranteed under the 14th amendment to the Constitution of the United States. *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254.

The court at p. 639 of 96 N. J. E., 126 Atl. 399, says:

> "But the argument by the complainant, followed by the learned vice-chancellor in this case, seems to be based upon the idea that the union cannot in good faith frame or adopt a rule providing for a *sliding scale of wages to fit ostensibly the varying local economic conditions throughout the United States*, which, in effect, does discriminate against some employers as a class in the matter of wages to be paid. It seems to be based upon the ground that such regulations create an unfair restraint of trade. *The attack is aimed, not at the combination, but at its effect upon the employers.* This is unsound, both legally and economically. (The court does not tell us how or why an attack aimed at the *effect* of a combination is unsound either legally or economically.) In the last analysis the prime object of the rule attacked is to establish a standard of wages."

This is a misconception of the argument of the complainant in that case as is succinctly pointed out by Judge

White in his dissenting opinion, 126 Atl. 403 (not officially reported).

It was not at the framing or adoption of *a* rule which would provide for a *sliding scale* of wages to fit ostensibly the varying local economic conditions throughout the United States at which the attack was aimed in *New Jersey Painting Co.* v. *Local No. 26*, 96 N. J. E. 632, 126 Atl. 399, but at the *ignoring by the Union of that sliding scale of wages, when fixed, in cases where contractors had their main offices* in localities other than that in which the work was being done, and the use by the Union of the *boycott* to effectuate the rule of discrimination—quite a different thing

The next case was *Marshall* v. *Brotherhood of Painters, Decorators and Paper Hangers of America*, in the Common Pleas Court of Philadelphia, not reported, a copy of the opinion being herewith handed to the court. The court indulged in no reasoning, relying almost wholly upon the opinion of the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26*, 96 N. J. E. 632, 126 Atl. 399, and fell into the same error as that court did with respect to the objection to the rule, treating it as a rule "establishing a *sliding* scale of wages to fit ostensibly the varying local economic conditions throughout the United States."

The court assumed to quote from *Hass Inc.* v. *Union No. 17, etc.*, 300 Federal 894. It quoted the language of the court in that case:

> "The effect of the rule in question is to make it difficult, if not impossible, for an outside contractor * * * The injury thus inflicted on the outside contractor and the public cannot be justified, since no legitimate interest of the defendants would be furthered by the operation of the rule in question."

And it then says:

"We do not see how the public can be injured by any such means."

What the court had said in the Hass case was:

"This result has been accomplished by a combination of the defendants to prevent, by means of threats and intimidations, persons who otherwise would be willing to do so from working for such outside contractor, except on terms that make it difficult, if not impossible, for them to compete with local contractors. * * * The injury thus inflicted, etc. * * *"

I had always assumed that the public *is* injured by the elimination of competition. The Philadelphia court seems to have thought otherwise.

The next case was *Douglas & Bros. Inc.* v. *Mallette*, Equity No. 7502, in the Superior Court of Rhode Island, not reported, copy of which opinion is handed to the court. The court followed *New Jersey Painting Company* v. *Local No. 26*, 96 N. J. E. 632, 126 Atl. 399, and *Marshall* v. *Brotherhood of Painters, Decorators and Paperhangers of America*, Common Pleas Court of Philadelphia, and it expressed its view that the public was in nowise injured, apparently by the elimination of competition, and also said that it clearly became necessary for the Union to regulate the matter by some rule "because it would seem clear that, from the point of view of the Union, it would be unwise to have different members of the Union *from different localities* working on the same job in the same place, receiving different wages for doing the same work," and it also stated that the Union had obviously had in mind the establishment of a *sliding* scale of wages.

Just why it would be unwise, and what complaint there could be, if different members of the union from different localities working on the same job, received different wages for doing the same work, if in the different locali-

ties from which the members came there was a difference in the cost of living which, in turn, was reflected in the different wage scales, is not made plain. It would seem to be clear that if a man, with a family in New York, living under New York conditions and therefore enjoying a New York wage scale, should be transported to Somerville, New Jersey, he should receive the New York wage, for he is living in New York and obliged to support himself and his family by paying New York rates.

But it is not at all clear that, because this man, who must pay for his living at New York rates, is to be paid upon the New York scale, a local artisan living in Somerville with a rate of wage fixed by the Union in the light of the Somerville cost of living, should likewise receive the New York wage. If he is paid the New York wage, then the difference between the local rate and the New York rate is a gift from the contractor, and ultimately from the public, for the public pays.

Why is it unwise to have different rates of wages? The Union suggests because there may be friction, but I repeat that no probative proof of any such friction has been offered, and although the rule was in existence, defendants claim, for fifteen or sixteen years it was never enforced and work went on harmoniously, and in every case in which injunctions have been granted, the work proceeded harmoniously. Workmen do not labor harmoniously merely because of an injunction of the court. We have not a single artisan called who testifies that he is insisting upon any such rule as is here involved. *The demand does not come from the workmen, but from their leaders.*

Moreover, as I have already pointed out, under the existing rule, *even if the contractor employs all local men, still he must pay, if it be the higher, the wage scale of the locality in which he has his main office. The basis of*

classification is not the locality from which the workmen come.

The rule creates an unjust discrimination among Union members. Six workmen, all from Somerville, may be employed in Somerville, equally divided between two jobs precisely alike—one being erected by a local and the other by a foreign contractor. One set doing the same work coming from the same locality gets a higher wage than the other. What possible justification can there be for this?

The court also indicated that because it was not the *purpose* of the rule to discriminate, there could be no relief. Acts are judged by their effect and not their purpose, as will be hereafter argued.

The court also fell into the same error, as did the New Jersey Court of Errors and Appeals, in *New Jersey Painting Co.* v. *Local No. 26, etc., et als.*, 96 N. J. E. 632, 126 Atl. 399, *i. e.*, that the complaint was against the establishment of a *sliding* scale of wages, whereas it was against the establishment of a sliding scale of wages and the ignoring of that sliding scale of wages because a contractor happens to have his main office in another district.

The next case was *Barker Painting Company* v. *Brotherhood of Painters, Decorators and Paper Hangers, etc., et als.*, in the District Court of the United States for the Eastern District of Pennsylvania, in which the court denied a preliminary injunction with the statement that it agreed with the reasoning and conclusions in *Marshall* v. *Brotherhood of Painters, etc.*, in the Common Pleas Court of Philadelphia, and in *Douglas & Bro.* v. *Mallette*, in the Superior Court of Rhode Island, and in *New Jersey Painting Co.* v. *Local No. 26, etc.*, 96 N. J. E. 632, 126 Atl. 399. That case came to the Circuit Court of Appeals of the Third Circuit and the decision was affirmed in 15 Federal 2nd, p. 16, Judge Buffington dissenting (p. 19.) The ap-

plication was for a preliminary injunction and the court said:

> "In this proceeding the burden of justifying the rules does not rest on the respondents; it is for the complainant, *who pressed for a preliminary injunction before the answer was filed,* to establish that the rules are unlawful by evidence sufficient to invoke that *extraordinary* remedy."

The court, after indicating that there *might* be justification for the rule, instancing certain matters which might be taken into consideration said:

> "We advert to these possibilities, certainly not to express our views nor to intimate sympathy with the rules,—*for assuredly we have none*—nor to suggest arguments in their support or reasons justifying their promulgation, but merely to show that many variable and intangible factors inevitably enter into the situation, making the injunctive process of doubtful propriety and legality. * * * Because of many unknown factors and the uncertainty of what would be the consequences to both employers and employees of a ruling of the nature sought by the complainant, the case is far from clear."

The net effect of the decision of the court was that the plaintiff had not satisfied it by clear and convincing proof, that it was entitled *to a temporary injunction.*

Judge Buffington dissented and pointed that

> "Enforced as they (the rules) will be by the affirmance of this case, the rules shut out a citizen of the United States from fair competition in Philadelphia business simply because he is a resident of New York State, and give to this competitor a monopoly of that business because he is a resident of Pennsylvania."

An application for a writ of certiorari from the Supreme Court of the United States was denied, 273 U. S. 748, 71 L. Ed. 872. In the instant case, an appeal from a final decree, reliance is placed in justifying the rule only upon

the elimination of friction which is not proven to have existed, and the fact that defendants *believe* that foreign contractors figure on the higher rate for labor. None of the other reasons, which are referred to by the Third Circuit Court of Appeals in 15 Federal, 2nd, at p. 18, are availed of. That court said (p. 18)—

> "If he (the foreign contractor) pay a higher rate to the home laborers and a lower rate to the local laborers, trouble will inevitably follow."

The complete answers are: for fifteen or sixteen years there was harmony; if there had been any trouble it would have been perfectly easy to introduce probative evidence to the effect and none was offered; after the Union determined to enforce the rules, when injunctions were granted, the laborers continued to harmoniously work; there is an economic reason why the rate paid to the artisan brought in from a foreign district should be that of the foreign district, whereas, the artisan hired on the spot should be paid the rate of the locality from which he comes, and it is not to be assumed, at least without proof, that there is going to be friction among union laborers because of a difference in wage scale when there is an economic reason for that difference, as men are supposed to be reasonable; there was no evidence that on this job any different rate of wages was applied to laborers performing the same work; the rule applies whether any "foreign" laborers are employed or not; the difference is not based on the residence of the laborers or the place from which they come but on the locality of the main office of the contractor; if a laborer living in New York works in Somerville for a local contractor he gets the local wage; if he performs the same work for a contractor with a main office in New York, he gets the New York wage.

The Third Circuit Court of Appeals suggested that an argument might be made that the higher wage scale should be paid because, when an employer leaves his locality of

higher wages, he may leave at home laborers unemployed and that the union may "legislate for the continued employment of laborers in varied localities at varied wage rates by providing rules that will measurably insure employment everywhere." This argument is not made, or at least was not in the courts below, and I *do* submit that it would be going pretty far to say that labor may, in order to secure its employment by a contractor in his "home" district, so discriminate, and enforce that discrimination by the boycott, against that contractor when he goes to any other district as to compel him to remain in his "home" district and not take work elsewhere, *for to be effective the power of the Union must go to that extent.* But, even then, it will *not* be effective for *the number of laborers employed in a district does not depend upon the number of contractors in that district but upon the amount of work.* Wherever there is work to be done, there will be found contractors to do it, and, labor in the building industry over the territory which we are discussing being practically 100 per cent. organized, it is quite immaterial (from an economic standpoint) whether contractor A or contractor B performs the work.

The result of admitting any such right in the Union is to admit its right not only to determine that none but union labor shall work but who shall be permitted to contract to do the work.

The remaining suggestion of the Third Circuit Court of Appeals with respect to the influx of laborers and the increase in work at one place or the decrease of laborers and the decrease of work at another place, etc., is not met by the provision of the rule which requires the higher wage scale to be paid, nor is it designed to be met by that provision. It *is met*, as far as it may be, by the provision of the rule which requires the foreign contractor to engage fifty per cent. local help, and that rule is not in dispute in this case. If the Union desires to raise the precentage it

may do so. The matter of "influx, etc. of laborers" is not governed by the "influx of contractors" but by the increase of work. Contractors neither create nor diminish work—work creates and diminishes the contractors.

The next and last case was *Barker Painting Company* v. *Brotherhood of Painters, Decorators and Paper Hangers, etc., et als.*, 23 Federal, 2nd 743, Court of Appeals for the District of Columbia. That case went off in the court below and, in effect, in the Appellate Court *because there was in fact no interference by the Union with the men employed by the Barker Painting Company.* The Barker Painting Company inserted advertisements in the local newspapers for workmen, and, in answer thereto, a number of local union painters appeared at the place of work. These men were met, however, by officers of the Union, who informed them that the Barker Painting Company intended to disregard the union rules, whereupon they refused to accept employment and left the place. The court said:

> "In this instance there was no strike or intimidation nor any threat of disorder or interference with appellant's right to employ non-union painters. It cannot be claimed that there was any breach of contract by the men; the latter simply refused to enter into any contract of employment upon the terms offered by appellant. It is certain that appellant could not compel the union painters to work for it upon its own terms, regardless of their consent * * *."

In the case at bar, plaintiff *had* commenced the work and had prosecuted it to the point that it was thirty per cent. complete. Its workmen were proceeding willingly, peacefully and satisfied, when the union officials, because of the rule, ordered them off the work, and it was only because of the active interference of the union officials that they left, and, when the pressure of the union officials was re-

moved by the injunction of the court, all but one returned and he did not remain away because of the rule.

Notwithstanding the fact that the employees of plaintiff were not under contract, it is entitled to their good-will "precisely as a merchant is entitled to the good-will of his customers, although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that, by properly treating its employees and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations." * * * "Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was at will and terminable by either party at any time, is of no consequence."

Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260, at p. 276, citing with approval *Truax* v. *Raich*, 239 U. S. 33, 38, 60 L. Ed. 131; *Brennan* v. *United Hatters*, 73 N. J. L. 729, 749; 9 L. R. A. (N. S.) 254; 118 American State Reporter 727, 65 Atl. 165, 9 Ann. Cas. 698.

In this case the question is *not* whether union employees may cease from work because the rule is violated nor is it whether officers of the Union may step between employer and *prospective employees* and insist upon compliance with the rule; it *is* whether, the relationship of employer and employee having been established, with the mutual assent of both parties, the officers of the Brotherhood may direct the severance of the relationship upon penalty that, if the orders are not obeyed the employee

either lose his membership or be fined, the loss of the membership meaning that the employee cannot obtain work at his trade anywhere, at least within the states heretofore mentioned, due to the unionization of the industry.

The proof showed in *Barker Painting Co.* v. *Brotherhood, etc.*, 23 Fed. (2nd) 743, that non-union labor might be obtained in Washington and the element of power of the Union due to the fact that the trade was practically 100 per cent. unionized was not present—as it is in the case at bar.

Upon the application of the Sherman Act, the court held that the union was protected by section 6 of the Clayton Act. But, I submit, that, in so holding, the court ignored the effect of the decision of this court in *Truax* v. *Corrigan*, 257 U. S. 312; 66 L. Ed. 254.

The court expressed the view that it did not think that the regulations were discriminatory, unreasonable, arbitrary or oppressive. It stated that the higher wage and shorter week rules were adopted by the Brotherhood prior to the year 1913; the fifty per cent. rule in 1922; and "they have been in force ever since."

The evidence in the case at bar shows that the rule, with respect to the higher wage rate and shorter hours, was not enforced prior to the Dallas convention of 1921, which led to the sending out of the letter of December 5, 1921, Plaintiff's Exhibit P. 4, p. 156, and that it had not been enforced is impliedly conceded by defendants' witness Joseph F. Kelly, the Second General Vice-President of the Brotherhood, when he says that, even after the Dallas Convention of 1921, *the rule was not enforced with respect to contracts which had been made before the notice of the Union of December 5, 1921*, Exhibit P. 4. He says that it would have been unfair to have enforced it with respect to those contracts (p. 118).

The court further said:

> "They (the rules) are designed to meet a situation which without regulation would be productive of confusion and disorder for union labor. The cost of living is higher in some places than in others; therefore union wages vary in different localities. If a contractor employs union labor upon work in his own city, he must pay the union wages of that locality; but, *if he moves his force of local labor* to another city, he may meet there with a higher or lower union wage scale, as well as with different limitations as to periods of labor. It was to meet these contingencies that the rules now in question were adopted; and this case does not involve their wisdom, but only their legality." (Suppose he does not move his force but employs local labor. Then why should he pay the wage scale of the locality in which he has his main office, assuming that to be the higher?)

I have already indicated that there is not in this case any evidence whatever that, in the absence of the rule, there was any confusion or disorder; the evidence is to the contrary.

The statement of the court that the contractor must meet different conditions in different places may be a statement of fact but the court does not indicate how the fact affords any justification for the rule.

While it may be true that the case does not involve the *wisdom* of the rule, it *does* involve more than its legality for there is in the case the question as to whether, *by combination, a boycott may be put in motion against Barker to enforce a rule* which, as applied to Barker, is wholly unreasonable. The court continues:

> "The rules do not discriminate against any particular person or place, and are uniform in their operation throughout the country."

It is not clear, I submit, how the effect of the discrimination is any less injurious or violative of Barker's rights

because it is not directed at it individually but at it as a member of a class *arbitrarily created.* If the rights of but one person were involved it would, except for the principle, be of little public importance whether the business of that one person was ruined. The fact that the discrimination extends to more than one has never been held to justify *arbitrary* discrimination. The extent of the discrimination indicates its public importance. What the court, undoubtedly, had in mind, as did other courts dealing with the same question and making the same statements, were those cases which have suggested that malice is a necessary element before the court will interfere in cases of this kind. I will deal with that subject later and content myself here with the statement that the recent authorities all hold that "malice," when used in this connection, means but an act performed without lawful justification.

W. A. Snow Iron Works v. *Chadwick,* 227 Mass. 382, 116 N. E. 801;

A. & L. Mfg. Co. v. *Carpenters' Council,* 308 Ill. 488, 139 N. E. 887;

Toledo A. A. & N. M. Ry. Co. v. *Pennsylvania Co.,* 54 Fed. Rep. 730;

Martin on the Modern Law of Labor, published in 1916, p. 34, etc.

An application made for a writ of certiorari from this court was denied, 276 U. S. p. 631, 72 L. Ed. 741.

The Opinion of the District Court.

The decision of the District Court was rendered prior to that of the Circuit Court of Appeals in *Barker Painting Co.* v. *Brotherhood of Painters, Decorators and Paperhangers, etc.,* 15 Fed. 2nd, 16, and the decision in the *Barker Painting Co.* v *Brotherhood of Painters, Decorators, Paperhangers, etc.,* in the Court of Appeals for the District of Columbia, 23 Fed. 2nd, 743. It is found

on p. 20 of the state of case, and is reported in 12 Federal 2d, 945.

The court below quoted copiously from the opinion of the majority of the Court of Errors and Appeals of New Jersey in *New Jersey Painting Co.* v. *Brotherhood of Painters, etc.*, 96 N. J. E. 632, 126 Atl. 399, and, in effect, based its conclusion upon the statute of New Jersey, P. L. 1883, 3 Comp. Stat. of N. J. 1910, p. 3051, sec. 128, which statute I will argue, if construed to permit the conduct of the Unions, is in contravention of the 14th amendment to the Constitution of the United States as well as of the Constitution of New Jersey.

The court noticed the argument that the mere fact that one or any other number of workmen may refuse to work for any reason, or for no reason, does not justify a combination, to, in effect, boycott by agreeing to decline to work, but stated that the trend of modern economic usage, both as practiced and as given expression in the courts, is increasingly against regarding combinations among laborers as unlawful *per se*, narrowing condemnation to those combinations which are formed for the purpose of effecting an unlawful object, or the doing of a distinct injury to one against whom the activities of the combination may be directed. I submit that the court has, in effect, treated as lawful a combination to effect *any* object which an individual acting alone might effect, which is *not* the law.

Gompers v. *Buck's Stove & Range Co.*, 221 U. S. 418, 439, 55 L. Ed. 797, 805;

Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260;

Quinn v. *Leathem*, 1901, App. Cases 495;

Pickett v. *Walsh*, 192 Mass. 572, 78 N. E. 753, at p. 757.

Plant v. *Woods*, 176 Mass. 492, 57 N. E. 1011;

A. T. Stearns Lumber Co. v. *Howlett*, 157 N. E. 82, 260 Mass. 45.

The court below also seems to have given weight to the intimation contained in the majority opinion of the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26*, 126 Atl. 399, 96 N. J. E. 632, to the effect that "The attack is aimed, not the combination, but at its effect upon the employers. This is unsound, both legally and economically."

Both courts, I submit, overlooked the fact that the question as to the legality of the combination, or rather as to whether a civil wrong is committed *by* the combination, is determined by the *effect* produced upon those against whom the act is directed and by the application of the principle *sic utere tuo ut alienum non laedas*, as the Supreme Court of New Jersey said in *Delaware and Raritan Canal Co.* v. *Lee*, 22 N. J. L. 243, at p. 247, and as this court said in *Hitchman Coal and Coke Co.* v. *Mitshell*, 245 U. S. 229, 62 L. Ed. 260.

There are but few acts which are inherently right or wrong. An act is denounced as a crime, or as a civil wrong, because of its *effect* upon others than the perpetrator of the act.

Every combination, and the acts of every combination, would be lawful were it not because of the effect upon others than those parties to the combination and to the acts. Why not?

In considering the object of the rule, the District Court said (p. 29) that in the minds of those who framed its terms there was one main plan—"that of *increasing* wages under certain conditions therein named. Whatever dispute there may be regarding these conditions, the fact must remain that there was in contemplation their utilization as a basis for wage increase."

And the court then went on to state that "the quest for increased wages is a lawful object."

I submit that the court fell into error when it stated that the object of the rule was to *increase* wages. No such object is expressed in the rule nor is that object given as justification for the rule by the officials of the Union who testified in this case. The court determined the *object* of the rule by *its effect in certain cases.* It is true that, in *certain* cases, *certain* workmen may receive, for the time which they work for the particular foreign emloyer, a higher wage but *that* was *not* the purpose of the rule. One might as well argue that, because the effect of this rule is to compel Barker to pay a higher rate of wage than a contractor local to the place in which the work is being done, *it was aimed particularly at Barker.*

The District Court then proceeded to say that the unlawfulness of the acts must be found either in the residential feature of the rule, or in the methods adopted in the attainment of the object, or in the effect which such attainment has produced.

In considering the methods used to effectuate the object the court indicated that the record is barren of any showing of intimidation, violence, or disorder of any sort and that that feature may safely be eliminated.

While there was no evidence of violence or disorder there *was* evidence of intimidation. The District Court overlooked the fact that it has been uniformly held that there may be intimidation without violence.

Barr v. *The Essex Trades Council,* 53 N. J. E. 101, 30 Atl. 881;

Toledo A. A. & N. M. Ry. Co v. *Pennsylvania Co.,* 54 Fed. Rep. 730, opinion by Judge Taft;

Truax v. *Corrigan,* 257 U. S. 312, 66 L. Ed. 254;

Duplex Printing Co. v. *Deering,* 254 U. S. 443, 65 L. Ed. 349;

And many other cases.

It is not possible, I submit, to urge that there is no intimidation when the penalty which would be visited upon workmen who persisted in working against the order of the Union leaders, would be dismissal from the union, in which event they would lose the right to earn a livelihood at their trade, or a fine, and it is not necessary for a threat that it be expressed in words. It is sufficient that it be understood.

See the cases above cited and *Beck* v. *Railway Teamsters' Protective Union*, 118 Mich. 497; 42 L. R. A. 407, at p. 416.

But, I submit that the court has overlooked another factor to be considered, *i. e., the factor of combination* and this involves the argument that has already been, and hereafter will be, made that, *while one or any number of the workmen may quit for any reason, or for no reason, the combination to quit is unlawful under the circumstances of this case.*

Upon the matter of the legality of the classification the District Court said:

> "Had the rule in question drawn a specfic line of demarcation, basing its operation avowedly upon differences in state citizenship, I can conceive that such differentiation would constitute an unlawful and forbidden discrimination; but as I read the rule, it is not subject to that interpretation, concerning itself in nowise with state lines, but applying to anybody and everybody who essays to do business outside of his home city, whether it be in a neighboring town in his own state, or in some distant foreign jurisdiction."

And the court said that, because of that fact, the rule is free "of the charge of effecting an unlawful discrimination."

While it is true that the basis of classification is not on *State* lines, the *effect* is to discriminate against con-

tractors coming from a foreign state, but the objection is not only that there is a discrimination against contractors coming from foreign states, but also that the classification is wholly based upon the locality in which the contractor may have his main office, *which has no reasonable relation to a wage scale* as pointed out by Judge White in his dissenting opinion in *New Jersey Painting Company* v. *Local No. 26,* New Jersey Court of Errors and Appeals, 96 N. J. E. 632; 126 Atl. 399, at p. 403.

The District Court, while conceding the rule that the classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis" suggested that the classification in this case has a reasonable relation to the subject matter for the reason that "yet, even so, it can hardly be urged as a general proposition that the matter of residence is one not germane to the question of wages, since it is, in a real sense and under all ordinary conditions, the controlling factor. A contractor, living and doing business in a small town, pays his workers the union wage scale established for that town. Eventually, and of his own accord, moving his business and establishing it in a large city, he accepts the altered conditions and pays the identical staff of workers the enlarged rate of the metropolis, for which the change of his 'home city' has come the consequent change in the stipend of his workers."

But the learned court must have been here referring not to a "contractor" but to a "manufacturer." It is quite true that when a *manufacturer* changes his "home" city, he changes his rate of wages, *either lower or higher,* if there be a difference, but that is because he removes *his entire* business to the new "home city" and his workmen, who are employed in the "home city" live in the "home city." It is not the change of the "home city" of the

manufacturer which makes the change in wage. It is the fact that the work which is now performed for him is performed in a "new" city. It is the place of the *performance of the work* which governs the wage scale and that is because the workmen are obliged to meet the living conditions of the place in which they perform their work, the living conditions being the determining factor in a wage scale.

But a painter or a building contractor does *not* perform his work at the place of his "home city." On the contrary, in his "home city," all that he may have is an office and *all* of his work may be performed outside of his "home city," and in places far remote.

Just as in the case of the manufacturer who moves his plant from one city to the other—the place of his plant, where the work is performed, should be the place determining the wage scale, so in the case of a contractor who has his work performed by labor outside of his "home city"—the place of performance should be the determining factor in the wage scale.

The District Court said:

> "The natural effect of all of the foregoing is to equalize, at the higher rate, the wages of all workers employed under the conditions set out in the rule under review, and thus, as it appears to me, the object and effect of the rule are lawful, as are also the foundation laid and the means relied on for its enforcement."

It is quite true that the effect of the rule is to equalize wages, at the higher rate, but the equalization is based upon a difference which has no relation whatever, economically, to the wage scale.

(a) The conduct of defendants is a boycott, the result of a conspiracy, illegal at common law;

(b) The rule is unreasonable and the classification bears no reasonable relation to the wage scale and the attempt of the Union to enforce it by combination is unlawful and a violation of the rights of plaintiff.

Considerable of the argument applicable to this has already been made. There are, however, certain principles of law to which reference should be made with their particular application to the case at bar.

This case may be argued to be one of *primary* boycott. There are *directly* involved, only the particular workmen employed by plaintiff, but there is superimposed, not only a rule adopted by *all* persons engaged in the painting industry, but an interference by Union officials (representing not only the painters' union but others) with the workmen of plaintiff, the only persons *directly* involved, who were working harmoniously with it despite the rule, and the compulsion of those union officials upon the workmen of plaintiff to comply with the rule under penalty of a fine or loss of membership in the organization, which would mean the loss of opportunity to make a livelihood. The general law of boycott is of importance.

Many of the courts, including the courts below, I submit, have fallen into the error of assuming that, because an act may be performed by one, it may be performed by many in combination and the mere fact of combination, plus compulsion brought by the combination as such, upon the individual members of the combination to comply with the demand of the combination may not, in and of itself be sufficient to render the acts of the combination illegal.

The law of boycott as applied to the case at bar.

In the very first case in this country in which the word "boycott" was used, *State* v. *Glidden*, 55 Conn. 46, 8 Atl. 890, 3 Amer. St. Rep. 23, the Connecticut court said (at p. 895 of 8 Atl. Rep.):

> "It is also a combination of many to impoverish and oppress a few. The weaker party needs and must receive the protection of the law. If in any case it is criminal for many to combine to do what any one may lawfully do singly, it would seem that this would be such a case. Numbers can accomplish what one man cannot—evil as well as good; and that is the reason of the combination. The law encourages combinations for good, and combinations by workmen to better their condition by legitimate and fair means are commendable, and should be encouraged. But combinations for evil purposes, whether by one class of men or another, are detrimental to the public weal and cannot be regarded with favor by the courts. But combinations for good purposes may be perverted, and when their power is sought to be used to harm their fellowmen, to deprive others of their just rights, then, *not the combination, but the use of it becomes criminal.* In such use there is a large element of wantonness and malice. Any one man, or any one of several men, acting independently, is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its numbers increase."

And the court further said, p. 894:

> "As a means of accomplishing the purpose, the parties intended to harm the Carrington Publishing Company, *and therefore it was malicious.*"

In *Quinn* v. *Leatham*, in the House of Lords of England (1901), Appeal Cases 495, 1 British Ruling Cases, 197, at p. 232, Lord Brampton said:

> "Much consideration of the matter has led me to be convinced that a number of actions and things

not in themselves actionable or unlawful if done separately without conspiracy *may, with conspiracy, become dangerous and alarming,* just as a grain of gunpowder is harmless, but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine, but administered frequently and in large quantities, with a view to harm, may be fatal as a poison."

And Lord Macnaghten said (p. 213):

"That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree in substance with the remarks of Bowen, *L. J.* and Lords Bramwell and Hannen in the Mogel case, (1889) 23 Q. B. D. 598 (1892) A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101. A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbors; but it is a very different thing (as Lord Fitzgerald observes) when one man has to defend himself against many combined to do him wrong."

And the House of Lords in that case considered the prior case of *Allen* v. *Flood* (1898), A. C. 1.

The effect of the decision of *Quinn* v. *Leatham* is that the gist of the action is *not* the malice but the *effect* produced, or sought to be produced, by the combination upon the rights of others. When the courts use the term "malice" they mean only the absence of a just cause or excuse, not for the act performed, but for the *effect* produced.

This court in *Gompers* v. *Buck Stove & R. Co.* (1911) 221 U. S. 418, 55 L. Ed. 797, at p. 805 said:

"But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence

of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one."

In *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260 (1917) this court recognized the effect of numbers when it said at p. 279:

> "It was one thing for plaintiff to find from time to time, comparatively small numbers of men to take vacant places in a going mine; another and a much more difficult thing to find a complete gang of new men to start up a mine shut down by a strike, when there might be a reasonable apprehension of violence at the hands of the strikers and their sympathizers."

And in *Pickett* v. *Walsh*, 192 Mass. 572, 78 N. E. 753, at p. 757, the Supreme Court of Massachusetts said:

> "In addition to the limitation thus put on labor unions *there is a fact which puts a further limitation on what acts a labor union can legally do.* That is the increase of power which a combination of citizens has over the individual citizen. * * *"
>
> "The result of this greater power of coercion on the part of a combination of individuals is that *what is lawful for an individual is not the test of what is lawful for a combination of individuals; or to state it in* another way, *there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do.*"

And see *Plant* v. *Wood*, 176 Mass. 492, 57 N. E. 1011 (1900).

A. T. Stearns Lumber Co. v. *Howlett*, 260 Mass. 45; 157 N. E. 82 (1927).

Neither the fact that the act is one which may properly be performed by a single individual nor the fact that the object has some reference to wages, hours or working conditions, is determinative of the legality of the acts of a combination.

The right of a single union man to refuse to work with a non-union man is conceded.

The maintenance of a closed shop has a direct bearing upon both wages and terms of employment but a strike, as a result of a combination to enforce a closed shop over a wide territory, is unlawful, although the right of an individual not to work in any but a closed shop must be conceded.

Baldwin Lumber Co. v. *Int. Brotherhood of Teamsters*, 91 N. J. E. 240, 109 Atl. 147 (1920);

Connors v. *Connolly*, 86 Conn. 641, 86 Atl. 600, (1913);

Curran v. *Galen* (1897), 152 N. Y. 33, 46 N. E. 297;

Lehigh Structural Steel Co. v. *Atlantic Smelting & Refining Co.* (1920), 92 N. J. E. 131, 111 Atl. 376;

McCord v. *Thompson-Starrett* (1910), 113 N. Y. Supp. 385, affirmed 198 N. Y. 587, 92 N. E. 1090;

Folsom v. *Lewis* (1911), 208 Mass. 336, 94 N. E. 316.

The right of a single union man to refuse to work with a non-union man is conceded and that right has a relation to the terms of employment but an agreement to compel an employer to discharge a non-union man at the request of the union is illegal.

Berry v. *Donovan* (1905), 188 Mass. 353, 74 N. E. 603.

The right of a union man to refuse to handle material sold by any particular person may be conceded, but an

agreement among union members to so refuse to handle such material is unlawful.

Burnham v. *Dowd*, 217 Mass. 351; 104 N. E. 841 (1914);

A. T. Stearns Lumber Co. v. *Howlett*, 260 Mass. 45, (1927), 157 N. E. 82;

J. D. Loizeaux Lumber Co. v. *Carpenters' Local of Roselle, N. J.*, N. J. Chancery, opinion by Vice-Chancellor Buchanan, unreported, opinion handed to the court.

The matter of employment of apprentices has reference to the terms of employment, nevertheless a combination to protest against the employment of an employee as an apprentice on the ground that it is a breach of one of the rules of the association is illegal.

Read v. *Friendly Society of Operative Stonemasons* (1902), 2 K. B. 732, 1 British Ruling Cases, 503.

The number of men employed by an employer not only has reference to the terms of employment but also to the matter of wages, nevertheless a rule of labor union requiring the employment of a minimum number is unlawful.

Haverhill Strand Theatre Co. Inc. v. *Gillen* (1918), 118 N. E. 671, Massachusetts Supreme Court, L. R. A. (N. S.) 1918 C. 813, 229 Mass. 413.

Collective bargaining goes to the terms of the employment but a strike to enforce it is unlawful.

United Shoe Machinery Co. v. *Fitzgerald* (1921), 237 Mass. 537, 130 N. E. 86.

A single white man may rightfully refuse to work with a colored man, but a combination of white men to refuse to work with a colored man is illegal.

It is not always true that men may quit work for any or for no reason.

It is necessary to cite but one case.

In *Toledo A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.* (1893), Circuit Court, Northern District of Ohio, before the late Chief Justice Taft, then Circuit Judge and Ricks, *J.*, 54 Federal 730, the late Chief Justice conceded at p. 737 that the statement is not always true, and he said:

> "But it is said that it cannot be unlawful for an employee either to threaten to quit or actually to quit the service when not in violation of his contract, because a man has the inalienable right to bestow his labor where he will, and to withhold his labor as he will. *Generally speaking, this is true, but not absolutely.* If he uses the benefit which his labor is or will be to another, by threatening to withhold it or agreeing to bestow it, or by actually withholding it or bestowing it, for the purpose of inducing, procuring, or compelling that other to commit an unlawful or criminal act, *the withholding or bestowing of his labor for such a purpose is itself an unlawful and criminal act.* The same thing is true with regard to the exercise of the right of property. A man has the right to give or sell his property where he will, but if he give or sell it, or refuse to give or sell it as a means of inducing or compelling another to commit an unlawful act, his giving or selling it or refusal to do so is itself unlawful."

Many cases in which strikes, as such, have been enjoined are in point.

Folsom v. *Lewis*, 208 Mass. 336, 94 N. E. 316;

Baldwin Lumber Co. v. *Local No. 560, etc.*, 91 N. J. E. 240, 109 Atl. 147;

A. T. Stearns Lumber Co. v. *Howlett*, 157 N. E. 82; 260 Mass. 45.

Lehigh Structural Steel Co. v. *Atlantic Smelting & Refining Co.*, 92 N. J. E. 131, 111 Atl. 376;

International Organization v. *Red Jacket C. C. Co.*, 18 Fed. (2d) 839.

The underlying principle upon which the acts of defendants must be held to be illegal.

The underlying principles upon which boycotts are held unlawful are not difficult to ascertain. Every man is entitled to conduct his business freely, and as he chooses, subject, of course, to the maxim *"sic utere tuo et alienum non laedas."* Every man is entitled to labor, or not to labor, for another as he chooses. Every man has the right to deal freely with any other man, and every man has the right to have others deal freely with him. These rights are as absolute as any rights may be, all rights being subject to constraint in the interest of the public. If, in the exercise of the respective rights of the individual, injury is done to others, the injury is *damnum absque injuria.* But there is no absolute right of individuals to act in concert. *The right to act in concert is a qualified right.* Whether it may be exercised or not depends upon the *effect* which it may have upon the nearly absolute rights, qualified only by the maxim before mentioned, of individuals outside the combination. If the effect of the act performed in combination is to unduly injure the public, or the absolute rights of individuals outside of the combination, then, *because of that effect,* the act of the individuals in combination may be prevented, although each individual acting separately, may have performed the act free from interference. *The underlying principle is that there is no absolute right to act in combination.*

The right of a single individual to refuse to work for John Jones, except at the rate of fifteen dollars a day, and to refuse to work for John Smith except at the rate of ten dollars a day, and to agree to work for Robert Roe at the rate of five dollars a day is conceded. The reason that he may so discriminate is *not* because the discrimination is based upon a matter of wages but because he may refuse to work for any one of the three for any reason

whatever. The fact that the discrimination is accomplished by a difference in a wage demand adds nothing to the right. But can it be that *all* workers, or any considerable number of workers in a community may *combine* to refuse to work for John Jones except at the rate of fifteen dollars a day, and to refuse to work for John Smith except at the rate of ten dollars a day and to agree to work for Richard Roe for five dollars a day? Does the fact that the discrimination is accomplished by means of a wage demand justify *the combination to discriminate?* It must be conceded that the right to discriminate, so far as the individual is concerned, for an arbitrary cause or for no cause, is just as broad as the right to discriminate because of a matter of wages. It likewise must be conceded that a combination to discriminate, in the manner in which I have pointed out is illegal if the cause be arbitrary. Does the fact that the basis of discrimination has reference to wages justify it? If it does, then, indeed, labor unions are possessed of a weapon *by which they can determine the persons engaged in an industry who shall do business and who shall not.* Can this be?

In considering this matter we must search for the reason why, although an individual may perform certain acts and any number of individuals may perform the identical acts, they cannot do so *by agreement.* The reason is *not* that each individual in the combination has not the absolute right to perform the acts but the *effect* of what they do by agreement upon others.

Otherwise stated, it is not a denial of the right of the parties to the agreement to do the things they do, but a denial of the right to exercise that right in combination because of the *effect* of the exercise of the right upon the relative rights of others. Why is it that a union cannot insist, by agreement, upon a minimum number of workers? It is because of the *effect* upon the business of the employer. Why is it that a union is not permitted to strike

to enforce a closed shop over a wide territory? It is because of the *effect* upon the non-union man. Why is it that a combination is not permitted to compel the employment of a union foreman? It is because of the *effect* upon the business of the employer. Why is it that a union is prohibited from interfering with non-union employers of a shop in order to unionize a non-union shop? *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260. It is because of the *effect* upon the business of the employer and the *effect* upon non-union workers. Why is it that an agreement to refuse to handle materials sold by one who furnishes supplies to an employer of non-union labor is prohibited? It is because of the *effect* upon the employer, the *effect* upon the person who sells the material manufactured by non-union labor, the *effect* upon the non-union men who work for that employer and the *effect* upon the public.

It is not yet necessary to pass upon the question whether or not a combination of individuals may be permitted to insist upon payment to them of a wage which is outrageous based upon no economic ground and destructive of employers as a whole. The time may be coming when *that* question will have to be dealt with and, when it comes, there is no doubt but that the courts will deal with it by applying the maxim *sic utere*, etc. *Brennan* v. *United Hatters*, 73 N. J. L. 729, 65 Atl. 165; *Cyrus Currier* v. *International Molders*, 93 N. J. E. 61, 115 Atl. 66.

The right of workers to combine to refuse to work except upon a certain scale of wages is the result of growth.

A history, somewhat incomplete, is given in Eddy on Trade Combinations, commencing at sec. 419 and running to sec. 444. There was dispute at one time in England whether such a combination could be formed at common law, and statutes were finally passed making it lawful. There were cases in this country in which it was held that,

under the English common law, such combinations were unlawful. A consideration of the history will indicate that the growth was a matter of economic conditions and it was finally determined that there might be such a combination. But the reason of it was, as stated by Eddy, who wrote in 1900, sec. 444, p. 323:

> "It is better for the law to leave employers and employees free to form such associations as they please in relation to rates of compensation so long as the associations are voluntary. These associations will act upon each other; if the employees demand too much or the employers offer too little, such condition cannot continue for long or be productive of any serious inconvenience to the community, as that side must ultimately give way the demands of which are not founded in reason and justice. Where, however, combinations are formed to intimidate employers or to coerce other employees, *it matters little what are the measures adopted, if the object is to interfere with the rights of others and to control their free action, such combination is illegal.*"

There have been many changes since 1900, and, as the law as it was laid down in 1900 was the result of growth, changing from time to time, it is not and never can be considered static, but must remain capable of growth to cope with new conditions and I have no doubt but that, were there a labor union in this country strong enough to enforce upon employers an outrageous demand for wages, which would have the effect of doing injury to the public, and the economic conditions were such as that the balancing of association against association, as indicated by Eddy, would not work, the law would find a way to cope with the situation.

But that is not the situation here. This is *not* an attempt to compel employers *generally* to pay a certain wage. It is an attempt never before tried, so far as my examination of the books discloses, *by agreement to discriminate in the demand for wages between certain employers.*

There is injected in it the idea of *discrimination* which was not present in any of the cases referred to by Eddy or which I can find.

If the workers have the right to, by combination, discriminate in matter of wages as they have attempted in this case, *there is no limit to their power to advance one employer and to destroy his competitor.* Such a discrimination is abhorent to every idea of equality upon which the American government is founded.

It is a violation of the fundamental idea expressed in the 14th amendment to the Constitution of the United States and in the first section of the Constitution of New Jersey. It is not contended but that one man may discriminate. He may, for any reason or for no reason, but just as there cannot be an agreement to refuse to work for *no reason* so that can be *no agreement to discriminate,* using as a weapon of the discrimination a matter of wages. The illegality arises not, as has been stated, because of the combination but because of the *effect* of the combination upon the employers, that *effect* being produced by the greater power of the combination and, as Eddy says, it matters little what are the means adopted if the object is to interfere with the rights of others and to control their free action. Against the right of the workers to combine in matter of wages stands the right of the employer, as a citizen of the United States and of the State wherein he resides and as a man by nature free and independent with certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness, and whether expressed in words or not, embodied in the very fabric of our institutions, to be free from unjust discrimination.

This Court has indicated that there are certain acts which may be so abhorent to the fundamental concept of

our government as that one may be considered as protected against their performance under the constitution although the right is not clearly expressed in the constitution.

Pierce v. *Society of Sisters, etc.*, 268 U. S. 510; 69 L. Ed. 1070.

It is one thing for a combination of employees to be formed to deal with a combination of employers on matters of wages, where the employers are to be treated as one group and the employees as another, but when the combination of workers seek to make distinction *between the employers* then the check stated by Eddy fails.

If the law is as stated by the District Court then any union organization operating throughout the country may arbitrarily ordain discrimination as against employers, based solely upon their residence, and not only may any union do this thing, but *unions may combine,* and the combination, which may control all labor throughout the United States, may arbitrarily establish such discrimination. By this means all employers of labor may be driven out of a community except those who may have their residence therein. If discrimination is justified against non-residents, the conclusion cannot be escaped but that discrimination may be directed against residents, and all resident employers in a community may, by concerted acts of the union, be driven out of the community in which they reside in favor of non-residents. Not only may discrimination as to residence be based upon State lines, but county lines, or such arbitrary districts as the union may set up. A resident of the County of Essex, New Jersey, doing work in the adjoining County of Hudson, New Jersey, may be obliged to pay higher wages than a resident of the County of Hudson, New Jersey, doing work therein, and a resident of the adjoining County of Bergen, New Jersey, may be obliged to pay still higher rates.

If such a right is to be accorded to combinations of labor upon the theory that they have labor to sell for a price, and that must be the theory, then I submit that a similar privilege must be accorded to the sellers of any other product, and I see no reason, upon principle, why there may not be a combination of those dealing in hardware, or any other article of commerce, to sell at one price to a resident and at a lower price to a non-resident, or vice versa, and the districts may be as arbitrary as the combination of sellers desires to make them.

If this right is to be accorded to combinations of employees it cannot, upon principle, be withheld from combinations of employers (*Coppage* v. *Kansas*, 236 U. S. 1; 59 L. Ed. 441), *and employers may combine to pay one price for labor where the employees come from one district and another where the employees come from another district.*

If combinations may make discriminations based upon the residence of an employer, upon principle, I submit that they may make discriminations between employers based upon *any other ground of distinction which may occur to their minds,* as, for instance, between those who have capital invested of $100,000. and those who have have capital invested of $200,000.; between those who have made eight per cent. on invested capital for the preceding twelve months and those who have made sixteen per cent.; between those who are individuals, partnerships or corporations. Bases of discrimination may be created *ad infinitum*. And this is not fanciful. There can be found greater justification for a difference between the rate of wages to be charged to employers who have an invested capital of $100,000 and those who have an invested capital of $200,000 and those who may be individuals or partnerships or corporations, as the case may be, or between those who have made twelve per cent. on invested capital for the preceding twelve months and

those who have made other percentages, than there is for a difference between those who may have their main offices in one place and those who may have them at another. *Profit sharing may be compelled with a vengeance.* It is hardly necessary to say that if, under the law, such power exists in labor combinations, no amendment to the Constitution is required to permit a complete destruction of property and the establishment of a new social system.

Just as the power to tax includes the power to destroy, so does the power to discriminate and make that discrimination effective include the power to destroy.

C. Defendants are engaged in a conspiracy, in violation of the anti-trust acts, section 1, U. S. C. A., Title 15, p. 4, Act of July 2, 1890, c. 647, Sec. 1, 26 Stat. 209 (Sherman Anti-Trust Act), Secs. 12, 13, 14, 15, 16 and 17, U. S. C. A. Title 15, p. 148, Act of October 15, 1914, c. 323, 38 Stat. 730 (Clayton Act).

Plaintiff is engaged in interstate commerce within the meaning of the anti-trust acts.

The uncontradicted testimony of Rosenthal (p. 42) is to the effect that plaintiff carries on its business over the United States from New York to Winnipeg, New Orleans to New York to Dallas to New Orleans to Winnipeg; its materials are usually purchased in New York and shipped to different jobs in different states of the union, and then back to New York; large amounts of material are purchased in New York and shipped; some materials are bought on the jobs; as a part of its business it makes contracts for the performance of work all over the United States, the contract, the performance of which was interfered with by the action of defendants, was made for the performance of work in the State of New Jersey; the effect of compliance with the rule will be to exclude

plaintiff from competition with local contractors in different parts of the United States.

The terms "trade" or "commerce" as used in the anti-trust acts are not technical terms. They comprehend every species of commercial intercourse.

Gibbons v. *Ogden*, 9 Wheaton 1; 6 L. Ed. 23;
Kidd v. *Pearson*, 128 U. S. 1; 32 L. Ed. 346.

In *Second Employers Liability Cases*, 223 U. S. 1; 56 L. Ed. 327, this court said:

> "The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers, and property by common carriers, whether carried on by water or land."

In *United States* v. *Eastern States Retail Lumber Dealers' Assn. et als.*, 201 Fed. 581, District Court, Southern District of New York, Circuit Judges Lacombe, Coxe, Ward and Noyes sitting, Circuit Court Judge Lacombe delivering the opinion of the court said:

> "It is now well settled that the words 'restraint of Trade' in that (the Sherman) Act are to be construed as including restraint of competition. Full, free and untrammeled competition in all branches of interstate commerce is the desideratum to be secured."

The decree was affirmed in this court, 234 U. S. p. 600; 58 L. Ed. 1490.

And see *County of Mobile* v. *Kimball*, 102 U. S. 691; 26 L. Ed. 238.

In *Swift & Company* v. *United States*, 196 U. S. 375; 49 L. Ed. p. 518, this court 49 L. Ed. p. 525 said:

> "* * * commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit,

after purchase, in another, and when in effect they do so with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."

In *Binderup* v. *Pathe Exchange, et al.*, 263 U. S. 291; 68 L. Ed. 308, reversing the Circuit Court of Appeals for the 8th Circuit, this court held that the manufacturing of moving picture films in one State and finding customers for them in another State, making contracts with the customers for their use and transporting the films from the State where manufactured to the State where they are to be used, constitutes interstate commerce even though the films are consigned in the different States to local depositors as agents for the manufacturer.

Marienelli, Ltd. v. *United Booking Offices of America, et al.*, 227 Fed. 165 (District Court, S. D. New York), was a suit for damages under the Sherman Act. The individual defendants owned many vaudeville theatres throughout the United States, arranged in two Circuits, an eastern and a western. The two corporate defendants were booking agents for the two circuits. The defendants entered into an agreement that the Eastern Owners would not employ anyone not booked through the Eastern booking house, and no performers would be employed who played outside of the two Circuits. A similar arrangement was made by the Western owners and the Western booking house. Black-lists were made up by each of the booking houses and these were exchanged between them. There was a demurrer to the complaint. The court said:

"Undeniably certain aspects of the business are interstate commerce, as, for instance, the contracts made by the booking companies under which the performers must go from state to state, throughout the circuit, acting here and there and fulfilling their contracts as much by travel as by the acting. Since

> Hoke *v.* United States, 227 U. S. 308, and Wilson *v.* United States, 232 U. S. 563, it cannot be doubted that this feature of the business was within the complete powers of Congress for such purposes as it might find to the public interest. This moreover, applies as well to that feature incidental to the foregoing, which consists in the carriage of the performer's stage properties and paraphernalia from one state to another, a necessary part of the performance of their contracts with defendants. (Citation.) The same may be said of the scenery and advertising matter sent from state to state by the theatres themselves. In respect of all these details, the business, therefore, consists of interstate commerce."

The same ruling was made by the Circuit Court of Appeals for the Second Circuit in *Fox Film Corporation* v. *Federal Trade Commission,* 296 Fed. 353, and also in *Fox Film Corporation* v. *Trumbull,* 7 Fed. 2d 715, 721.

The Marienelli cases has been approved in:

United States v. *United States Shoe Machinery Co.,* 234 Fed. 127, 144;

Sullivan v. *Associated B. & D. of U. S.,* 272 Fed. 323, 327.

A case which is of the utmost importance I submit is *Ramsey* v. *Associated Billposters, et al.,* 260 U. S. 501; 67 L. Ed. 368, reversing the United States Circuit Court of Appeals for the 2nd Circuit, 271 Fed. 140. This was an action for damages against the Associated Billposters under the Sherman Act. Plaintiffs were solicitors of advertising for customers in many states; they prepared, designed, purchased and sold billposters, and caused them to be displayed by local operators throughout the United States and Canada, contracting with their customers and receiving pay for the entire service of preparing, designing, purchasing and posting the advertisements, and it was held that they were engaged in interstate commerce, and that a combination interfering with the con-

duct of their business was a violation of the Sherman Act. The court said at p. 370 of 67 L. Ed.:

> "Plaintiffs had developed a lucrative and profitable business when, in July, 1911, the Association cancelled their licenses and refused to renew the same. Now, as a result of the defendant's unlawful acts, they are disabled from competing in the markets, and their business is restricted and unprofitable.
>
> The court below held: 'The business of the solicitors is to send their customers' advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that after the posters have arrived at destination, the posting of them by the billposters is purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in Hopkins *v.* United States, 171 U. S. 578, 43 L. Ed. 290, 19 Sup. Ct. Rep. 40.'"

With respect to this statement of the court below this court said:

> "We cannot accept this view. The alleged combination is nation-wide; members of the Association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the states and with Canada. As a direct result of the defendant's joint acts, plaintiff's interstate and foreign business has been greatly limited or destroyed. Hopkins *v.* United States is not applicable. There the holding was that the rules, regulations, and practices of the association directly affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding noncompetitive prices. The allegations clearly show

the result has been as designed—that the statute has been violated and plaintiff's business has suffered.

This court has heretofore laid down and adequately discussed the applicable principles. (Citing many cases.) The fundamental purpose of the Sherman Act *was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.* The alleged actions of defendants are directly opposed to this beneficient purpose and are denounced by the statute."

In *Aeolian Company* against *Fischer, and others,* United States Circuit Court of Appeals for the Second Circuit, decided April, 1930 (at this writing not reported, but it will be reported in 37 Federal, 2nd), the Circuit Court of Appeals, reversing the District Court 35 Federal, 2nd, 34 held that organ manufacturers who built parts of organs in one State and erected the organs in buildings in another were engaged in Interstate Commerce and that the business of erection was a part of the interstate commerce, and that a combination of unions to call strikes in building trades employed on the buildings in which the organ manufacturers were installing their organs was a conspiracy in restraint of interstate commerce.

The Circuit Court of Appeals relied upon *Anderson* v. *The Shipowners,* 272 U. S. 359; 71 L. Ed. 298 and said:

"The undoubted purpose of the appellees was to monopolize the work with which the appellants were concerned, that is, the installation of organs, and require only their membership or union workers for each job. It restricted the liberty of employers and employees to engage in interstate commerce, whenever the employment of non-union members is involved, and is an interference with interstate commerce. It is immaterial whether the combination is unlawful because it interferes with

the right of non-union men to engage in such part of interstate commerce or with the right of employers of non-union men to so engage; the result is the same. If the combination is illegal for either reason, the person or corporation injured in its or his property rights is entitled to relief. Chattanooga Foundry & Pipe Works *v.* City of Atlanta, 203 U. S. 390; U. S. *v.* Colgate & Co., 250 U. S. 300; Loewe *v.* Lawler, 208 U. S. 274; U. S. *v.* Patten, 226 U. S. 525. The inquiry is not as the court below conceived it to be, whether or not there was a combination to exclude the appellants' organs from interstate trade or commerce. *It is as much a violation of the Sherman Act, as amended by the Clayton Act, for combinations to exclude individuals from work in interstate commerce.* Finding that the installation of the organ was work in interstate commerce and that there was a combination directly to restrict and obstruct that work, the opportunities of engaging therein was work of interstate commerce. But the interference with this interstate commerce was not confined to preventing workmen from engaging in the employment of the appellants as non-union men. There was a combination to obstruct and interfere with the appellants in carrying out their interstate trade and commerce in their usual and practical way which, of itself, was a violation of the act. It is not material or important whether the restraint operates upon this interstate commerce at the point of origin or at the point where it comes to rest. Bedford Stone Co. *v.* Journeymen's Stone Co., 274 U. S. 37; Binderup *v.* Pathe Exchange Inc., 263 U. S. 291; Ramsay Co. *v.* Associated Bill Posters, 260 U. S. 501; Duplex Printing Press Co. *v.* Deering, 254 U. S. 443. The combination formulated by the appellees to curtail the liberty of the appellants and their employees to engage in the phase of the interstate commerce involving installation, was a violation of the anti-trust laws and their refusals to permit non-union men to work and striking to interfere with the work of the appellants in installing organs, was a violation of the anti-trust acts. Duplex

Printing Press Co. *v.* Deering, *supra;* Bedford Stone Co. *v.* Journeymen's Stone Co., *supra.*"

The opinion was by Manton and Chase, *J. J.* A. N. Hand, *J.* filed a concurring opinion.

(2) The conduct of defendants is a combination and conspiracy in restraint of trade within the meaning of the Sherman Act, Section 1, Title 15, U. S. C. A., "Commerce and Trade," p. 4, Act of July 2, 1890, c. 647, 26, Stat. 209 and within the meaning of Section 12, Title 15, U. S. C. A. p. 148, Act of October 15, 1914, c. 323; 38 Stat. 730, sec. 1, Clayton Act, and is not within the protection of Section 17, Title 15, U. S. C. A. p. 210; Act of October 15, 1914, sec. 6.

That the conduct of defendants has the direct effect of eliminating and suppressing competition can admit of no question. The evidence is that the enforcement of the rule will be that painting work will be confined to local contractors. Other than local contractors cannot compete. That the conduct of defendants has such an effect upon interstate commerce as to come within the condemnation of the Sherman Act and is not saved by the exemption provisions of the Clayton Act is, I submit, indicated by a consideration of the following cases:

Bedford Cut Stone Co. v. *Journeymen S. C. Ass'n,* 274 U. S. 37, 71 L. Ed. 916;

Duplex Printing Co. v. *Deering,* 254 U. S. 443, 65 L. Ed. 349, 16 A. L. R. 196;

Loew v. *Lawlor,* 208 U. S. 284; 52 L. Ed. 488, 13 Annotated Cases 815;

United States v. *Brims,* 272 U. S. 549, 71 L. Ed. 403;

International Organization v. *Red Jacket C. C. Co.,* 18 Fed. (2nd), 839.

Pittsburgh Terminal Coal Corporation v. *United Mine Workers of America, et al.,* 22 Fed. (2nd) 559;

American Steel Foundries v. *Tri-City C. T. Council,* 257 U. S. 184, 66 L. Ed. 189;

Vonnegut Machinery Co. v. *Toledo Machine and Tool Co.,* 263 Fed. 192, 200;

Truax v. *Corrigan,* 257 U. S. 312, 66 L. Ed. 254;

Decorative Stone Co. v. *Building Trades Council,* 18 Fed. (2nd) 333, affd. 23 Fed. (2nd) 426.

In *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 65 L. Ed. 349, this court, holding that a corporation's business is a property right and is entitled to protection against unlawful injury or interference, said that: if the purpose be unlawful, it may not be carried out even by lawful means, and although the purpose be lawful it may not be carried out by unlawful means; peaceful participation, even under the Clayton Act, is as much within the prohibition as one accompanied by force or threats and cannot be justified upon the ground that the participants may have some object beneficial to themselves or their associates, which possibly they might have been at liberty to pursue in the absence of the statute; the principal importance of Section Six of the Clayton Act is in what it does *not* authorize, and the limit it sets to the immunity conferred, it assuming the normal objects of a labor organization to be legitimate and that such an organization shall not be held in itself—because of its existence and operation—to be illegal, but that section does not relieve it from accountability for departure from its normal and legitimate objects, nor authorize it to engage in an actual combination or conspiracy or permit a labor organization to become a cloak for an illegal combination or conspiracy; the first paragraph of Section 20 of the Clayton Act merely puts into statutory form familiar restrictions already established and of general application, and it is but declaratory of the law as it stood before; the restrictive clauses of Section 20 must be strictly and literally construed; that section does not

repeal the prohibitions of the Sherman Act so far as applicable to labor organizations and does not confer upon such organizations a control over commerce that is denied to the governments of the States themselves; and this court further said:

> "That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce is necessary for the successful conduct of the business; that a widespread combination exists, to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated; and that as a result of it complainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future; is proved by clear and undisputed evidence. Hence the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act as amended by the Clayton Act. * * *."

In *Vonnegut Machinery Co.* v. *Toledo Machine and Tool Co.*, 263 Fed. 192, 200, the court said:

> "The interesting and unique question in the case however, is whether we have a situation here contemplated by and within the provisions of the first paragraph of Section 20 of the so-called Clayton Act. (Citation), and consequently one in which the court's injunctional powers are limited in view of any construction of the force of that measure. Concretely the query is whether at the foundation of this case is a controversy between employer and employees respecting terms and conditions of employment. If the Clayton Act is a discriminatory one, being in that respect class legislation, and assuming that it is yet constitutionally sustainable, an established and entirely valid rule of construction is applicable to the effect that the terms used should be strictly kept to their ordinary and usual

> force and meaning, while maintaining at the same time consideration of the evident purpose of the act. A law giving special immunities to a class necessarily impinges upon the rights of those against whom the statutory discriminations operate. The disturbance of parity of legal privileges between parties to a controversy manifestly affects the right, hence the rule of strict construction applies (Citation)."

In *American Steel Foundaries* v. *Tri-City Council,* 257 U. S. 184, 66 L. Ed. 189 this court declared that Section 20 of the Clayton Act "introduces no new principle into the equity jurisprudence of those (the Federal) courts. It is merely declaratory of what was the best practice always," and the court also said:

> "It has been determined by this court that the irreparable injury to property or to a property right, in the first paragraph of Section 20, includes injury to the business of an employer, and that the second paragraph applies only in cases growing out of a dispute concerning terms or conditions of employment, between an employer and employees, between employers and employees or between employees, or between persons employed and persons seeking employment, and not such dispute between an employer and persons, who are neither ex-employees nor seeking employment. Duplex Printing Press Company *v.* Deering, 254 U. S. 443, 65 L. Ed. 349, 16 A. L. R. 195, 41 Sup. Ct. 172. * * *"

In *Truax* v. *Corrigan,* 257 U. S. 312, 323, 66 L. Ed. 254 this court said:

> "We have but recently considered the clauses of section 20 of the Clayton Act sometimes erroneously called the 'picketing' clause. American Steel Foundries *v.* Tri-City Central Trade Council, opinion announced December 5th (257 U. S. 184, ante A. L. R. 42 Sup. Ct. Rep. 72). They forbid an injunction in labor controversies prohibiting any person 'from attending at any place where any such person or persons may lawfully be for the purpose of peacefully obtaining or communicating informa-

tion, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading, others by peaceful and lawful means so to do.'

"We held that under these clauses picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms which the statute sedulously avoided, but that, subject to the primary right of the employer and his employees and would-be employees to free access to his premises without obstruction by violence, intimidation, annoyance, importunity, or dogging, it was lawful for ex-employees on a strike and their fellows in a labor union to have a single representative at each entrance to the plant of the employer to announce the strike and peaceably to persuade the employees and would-be employees to join them in it. We held that these clauses were merely declaratory of what had always been the law and the best practice in equity, and we thus applied them. The construction put upon the same words by the Arizona supreme court makes these clauses of PP 1464 as far from those of section 20 of the Clayton Act in meaning as if they were in wholly different language."

In *United States* v. *Brims*, 272 U. S. 549, 71 L. Ed. 403, 6 Fed. (2d) 188, this court, in a case where the facts showed that a union workman would not work upon non-union made mill work, and this regardless of whether the same came from within or without the State of Illinois, where the agreement was made, and holding the defendants to be guilty of criminal conspiracy, in violation of the Sherman Act, said:

"They wished to eliminate the competition of Wisconsin and other non-union mills which were paving lower wages and consequently could undersell them. Obviously, it would tend to bring about the desired result if a general combination could be secured under which the manufacturers and contractors would employ only union carpenters with

the understanding that the latter would refuse to install non-union made millwork. And we think there is evidence reasonably tending to show that such a combination was brought about, and that, as intended by all the parties, the so-called outside competition was cut down and thereby interstate commerce directly and materially impeded. The local manufacturers, relieved from the competition that came through interstate commerce, increased their output and profits; they gave special discounts to local contractors; more union carpenters secured employment in Chicago and their wages were increased. These were the incentives which brought about the combination. The non-union mills outside of the city found their Chicago market greatly circumscribed or destroyed; the price of buildings was increased; and as usual under such circumstances, the public paid excessive prices.

The allegations of the bill were sufficient to cover a combination like the one which some of the evidence tended to show. It is a matter of no consequence that the purpose was to shut out non-union millwork made within Illinois as well as that made without. The crime of restraining interstate commerce through combination is not condoned by the inclusion of intrastate commerce as well."

In *Bedford Cut Stone Co.* v. *Journeymen S. C. Asso.*, 274 U. S. 37; 71 L. Ed. 916 this court reversed a decree of the United States Circuit Court of Appeals for the 7th Circuit, affirming a decree of the United States District Court of the District of Indiana, dismissing a bill filed to enjoin a conspiracy in alleged violation of the Anti-Trust Acts. The plaintiffs in that action were engaged in the business of quarrying or fabricating, or both quarrying and fabricating, Indiana limestone. The Journeymen Stone Cutters Association was an association of mechanics engaged in the stone cutting trade. Plaintiffs sold some of their stone directly to buildings where it was fitted, trimmed, and set in place and the remainder was sold in the rough to contractors to be fabricated. The plaintiffs

were operating upon the open shop basis. The General Union issued a notice to all of its locals and members directing its members not to work on stone "that has been started, planed, turned, cut, or semi-finished by men working in opposition to our organization." Such stone was termed "unfair."

This court said p. 920:

> "From a consideration of all the evidence, it is apparent that the enforcement of the general order to strike against petitioners' product could have had no purpose other than that of coercing or inducing the local employers to refrain from purchasing such product. To accept the assertion made here to the contrary, would be to say that the order and the effort to enforce it were vain and idle things without any rational purpose whatsoever. And indeed, on the argument, in answer to a question from the bench, counsel for respondents very frankly said that unless petitioners' interstate trade in the so-called unfair stone were injuriously affected, the strikes would accomplish nothing."
>
> "That the means adopted to bring about the contemplated restraint of commerce operated after physical transportation had ended is immaterial. Loewe *v.* Lawlor, 208 U. S. 274, 301, 52 L. Ed. 488, 502, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Boyle *v.* United States, 170 C. C. A. 603, 259 Fed. 803, 805, 806."

And further:

> "And the restraint of such commerce was the necessary consequence of the acts and conduct and the immediate end in view. Swift & Co. *v.* United States, 196 U. S. 375, 397, 49 L. Ed. 518, 524, 25 Sup. Ct. Rep. 276. Prevention of the use of petitioners' product, which, without more might have been a purely local matter, therefore, was only a part of the conspiracy, which must be construed as an entirety; and, when so regarded, the local transactions became a part of the general plan and purpose to destroy or narrow petitioners' interstate trade. W. W. Montague & Co. *v.* Lowry, 193 U. S.

38, 45, 46, 48, L. Ed. 608, 611, 612, 24 Sup. Ct. Rep. 307. In other words, strikes against the local use of the product were simply the means adopted to effect the unlawful restraint. And it is this result, not the means devised to secure it, which gives character to the conspiracy."

Neither the fact that there was no violence involved nor that one of the objects of the union was legitimate is an answer if the direct effect, as here, is to restrain interstate commerce.

United States v. *Reading Co.*, 226 U. S. 324, 57 L. Ed. 243;

Vandell v. *United States*, 6 Fed. (2d) 188;

Western Union Tel. Co. v. *Int. Brotherhood of Electrical Workers*, 2 Fed. (2d) 993, affirmed 6 Fed. (2d) 444;

Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260;

United States v. *Railway Employees Department of American Federation of Labor, et al.*, 283 Fed. 479.

In this latter case the court quoted from *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 65 L. Ed. 349 and *United States* v. *Patten*, 226 U. S. 525, 57 L. Ed. 333 and other cases in this court, and generally reviewed the law.

The same case again came before the same court in 286 Fed. 228, on motion to dissolve the temporary injunction and dismiss the bill, which motions were denied, the questions involved were considered at length, and the contentions of the defendant overruled.

Reviewing and citing cases at length, the court further said:

"Defendant's construction of section 20 would confer immunity upon the specified acts when committed in a labor controversy, even though back of that controversy there was a conspiracy to over-

throw the government itself. * * * The principle that acts lawful in themselves take on an unlawful character when they are so interwoven with acts inherently criminal that the whole plan must be condemned is one of such frequent application that it is unnecessary to comment upon it, further than to mention its application to *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418."

IV.

The Decision of the District Court was based upon the Statute of New Jersey heretofore mentioned and its construction by the New Jersey Court of Errors and Appeals in the New Jersey Painting Company Case, 96 N. J. E. 632; 126 Atl. 399, and the effect is that the District Court in the instant case has permitted the application of a statute which, as construed by it, is offensive to the provisions of the Fourteenth Amendment.

The New Jersey statute—"An act relative to persons combining and encouraging other persons to combine," P. L. 1883, p. 36, 3 Comp. Statutes of New Jersey, p. 3051, reads as follows:

> "That it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise, or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, or persons, or corporation."

In *Jonas Glass Co.* v. *Glass Bottle Blowers' Association* (1910), 77 N. J. E. 219, at p. 224, 79 Atl. 262, the New Jersey Court of Errors and Appeals, with respect to the scope of the act, P. L. 1883, p. 36, 3 C. S. of N. J. 3051, said (p. 224):

> "Reliance is placed by the defendants upon the 'Act relative to persons combining and encouraging other persons to combine.' P. L. 1883, p. 36; Gen. Stat. p. 2344, Pl. 23.

The enactment is (here follows the act):

> "In Mayer *v.* Journeymen Stonecutters' Asso., 47 N. J. E. (2 Dick.) 519, 531, Vice-Chancellor Green apparently treated this act as legalizing private injuries. And in Cumberland Glass Manufacturing Co. *v.* Glass Bottle Blowers' Asso., 59 N. J. E. (14 Dick.) 49, 53, Vice-Chancellor Reed construed it as permitting the adoption of peaceable measures for inducing workmen to quit or to refuse to enter an employment. *Whatever may have been the purpose of its framer, there are, as we think, constitutional obstacles in the way of giving the act so extensive a force.*
>
> The rights of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness, are declared by our constitution to be unalienable. N. J. Const. art. 1, p. 1. No act of the legislature is to be construed as infringing upon these rights unless its language plainly and clearly requires such a construction. *If its language so reads, it is to the extent indicated unconstitutional and void. The act of 1883 is, as we think, properly to be treated as merely rendering the combination no longer indictable;* in effect, as repealing the rule laid down by the supreme court of this state in State *v.* Donaldson, 32 N. J. L. (3 Vr.) 151. *It does not legitimize an invasion of private rights nor prevent the party injured from having full redress.* Its proper scope is indicated in the opinion of Vice-Chancellor Pitney in Frank & Dugan *v.* Herold, 63 N. J. E. (18 Dick.) 443, 447, 448."

The same court in *Brennan* v. *United Hatters,* 73 N. J. L. 729, at p. 744, 65 Atl. 165, had quoted with approval the statements contained in *Frank & Dugan* v. *Herold,* 63 N. J. E. 443, 52 Atl. 152.

Brennan v. *United Hatters,* 73 N. J. L. 729, 65 Atl. 165, and *Jonas Glass Co.* v. *Glass Bottle Blowers' Asso.,* 77 N. J. E. 219, 79 Atl. 262 were cited, with approval, in *Frank* v. *Nat. Alliance of Bill Posters,* Supreme Court of the State of New Jersey, 89 N. J. L. 380, 99 Atl. 134 and,

again, in *Dubrow* v. *Hornstra*, 95 N. J. L. 288, at p. 290, 112 Atl. 336 and by the Court of Chancery of New Jersey in *Baldwin Lumber Co.* v. *Local No. 560, etc.*, 91 N. J. E. 240, 109 Atl. 147 and, again, in *Currier & Sons* v. *Inter. Molders' Union*, 93 N. J. E. at p. 66, 115 Atl. 66 and, again, by the Court of Errors and Appeals in *Keuffel & Esser* v. *Inter. Asso. of Machinists* (1921), 93 N. J. E. 429, 116 Atl. 9.

In *Jonas Glass Co.* v. *Glass Bottle Blowers' Asso.*, 77 N. J. E. 219, 79 Atl. 262 the vote was ten to four. Minturn, *J.*, wrote a dissenting opinion, 77 N. J. E. 225, 79 Atl. 265.

In *Keuffel & Esser* v. *Inter. Asso. of Machinists*, 93 N. J. E. 429, 116 Atl. 9 the vote was 9 to 5. There were several dissenting opinions. That of Mr. Justice Minturn is found on p. 439 of 93 N. J. Eq. 429 at page 12 of 116 Atl. Reference to these dissenting opinions will indicate that the decisions of the New Jersey Court of Errors and Appeals in *Jonas Glass Co.* case, and *Keuffel & Esser* v. *Inter. Asso. of Machinists* were reached after a careful consideration of all that could be said in favor of the construction now apparently put upon the statute by the same court in *New Jersey Painting Co.* v. *Local No. 26, etc.*, 96 N. J. Eq. 632, 126 Atl. 399 and the court deliberately refused to put that construction upon the statute and held that, if such a construction *were* put upon the statute, it would be unconstitutional.

The decisions in *Jonas Glass Co.* v. *Glass Bottle Blowers' Asso.*, 77 N. J. E. 224, 79 Atl. 262 and in *Brennan* v. *United Hatters*, 73 N. J. L. 729, 65 Atl. 165 were written by Mr. Justice Pitney, afterwards a Justice of this court. This court has cited, with approval, the case of *Barr* v. *Essex Trades Council*, 53 N. J. E. 101, 30 Atl. 881, which was referred to, relied upon and approved by the New Jersey Court of Errors and Appeals in *Jonas Glass Co.* v. *Glass Bottle Blowers' Asso.*, 77 N. J. E. 224, 79 Atl.

262 in *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254. *Brennan* v. *United Hatters*, 73 N. J. L. 729, 65 Atl. 165 was cited with approval by this court in *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260. Both *Barr* v. *Essex Trades Council* and *Brennan* v. *United Hatters* were cited, with approval, in *International News Service* v. *Associated Press*, 248 U. S. 215, 63 L. Ed. 211, and in that case this court said:

> "The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right; and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired."

Jonas Glass Co. v. *Glass Bottle Blowers' Asso.*, 77 N. J. E. 219, 223, 41 L. R. A. N. S. 445, 79 Atl. 262 was cited with approval in *Hitchman Coal and Coke Co.* v. *Mitchell*, (1921) 245 U. S. 229, 62 L. Ed. 260, at p. 278; and, again, in *American Steel Foundries* v. *Tri-City C. T. Council*, (1921) 257 U. S. 184, 66 L. Ed. 189, at p. 198.

In the opinion in *New Jersey Painting Co.* v. *Local No. 26, etc., et als.*, 96 N. J. E. 632, 126 Atl. 399, the New Jersey Court of Errors and Appeals, in disapproving what that court had previously said, in *Jonas Glass Co.* v. *Glass Bottle Blowers' Asso.*, 77 N. J. E. 219, 41 L. R. A. (N. S.) 445, 79 Atl. 262, as to the effect of the statute, said at p. 640: (96 N. J. E.)—"Employers have no vested interest in the labor of workers."

This may be true, but employers *have a vested interest in the free flow of labor*, and in the right to make contracts for the employment of labor, and these rights may not be interfered with, except for causes which the law deems adequate, and in no case has the right to the free flow of labor and the right to be free from unlawful interference with the relationship of employer and em-

ployee been more strongly asserted than in *State* v. *Donaldson*, 32 N. J. L. 151 (1867), where the Supreme Court of New Jersey, said:

> "It appears to me that it is not to be denied that the alleged aim of this combination was unlawful; the effort was to dictate to this employer whom he should discharge from his employ. This was an unwarrantable interference with the conduct of his business, and it seems impossible that such acts should not be, in their usual effects, highly injurious. How far is this mode of dictation to be held lawful? If the manufacturer can be compelled in this way to discharge two or more hands, he can, by similar means, be coerced to retain such workmen as the conspirators may choose to designate. So his customers may be prescribed, and his business in other respects controlled. I cannot regard such a course of conduct as lawful. It is no answer to the above considerations to say, that the employer is not compelled to submit to the demand of his employees; that the penalty of refusal is simply that they will leave his service. There is this coercion; the men agree to leave simultaneously, in large numbers and by pre-concerted action. We cannot close our eyes to the fact, that the threat of workmen to quit the manufacturer, under these circumstances is equivalent to a threat, that unless he yield to their unjustifiable demand, they will derange his business, and thus cast a heavy loss upon him. The workmen who make this threat understand it in this sense, and so does their employer. In such a condition of affairs, it is idle to suggest that the manufacturer is free to reject the terms which the confederates offer. In the natural position of things, each man acting as an individual, there would be no coercion; if a single employee should demand the discharge of a co-employee, the employer would retain his freedom, for he could entertain or repel the requisition without embarrassment to his concerns; but in the presence of a coalition of his employees, it would be but a waste of time to pause to prove that, in most cases, he must submit, under pain of often the most ruinous

losses, to the conditions imposed on his necessities. It is difficult to believe that a right exists in law, which we can scarcely conceive can produce, in any posture of affairs, other than injurious results. It is simply the right of workmen, by concert of action, and by taking advantage of their position, to control the business of another."

In *Jersey City Printing Company* v. *Cassidy*, 63 N. J. E. 759 (1902) 53 Atl. 230 Vice-Chancellor Stevenson said:

"The underlying right in this particular case under consideration, which seems to be coming into general recognition as the subject of protection by courts of equity, through the instrumentality of an injunction, appears to be the right to enjoy a certain free and natural condition of the labor market, which, in a recent case, in the house of lords, was referred to, in the language of Lord Ellenborough, as a 'probable expectancy.' This underlying right has otherwise been broadly defined or described as the right which every man has to earn his living, or to pursue his trade or business, without undue interference, and might otherwise be described as the right which every man has, whether employer or employee, of absolute freedom to employ or to be employed. The peculiar element of this perhaps newly-recognized right is that it is an interest which one man has in the freedom of another."

* * * * * * * * *

"A large part of what is most valuable in modern life seems to depend more or less directly upon 'probable expectancies.' When they fail, civilization, as at present organized, may go down. As social and industrial life develops and grows more complex these 'probable expectancies' are bound to increase. It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of these 'probable expectancies.'"

"In undertaking to ascertain and define the rights and remedies of employers and employees, in respect of their 'probable expectancies' in relation to the labor market, it is well not to lose sight altogether of any other analogous rights and remedies which are based upon similar 'probable expectancies.' It will probably be found in the end, I think, that the natural expectancy of employers in relation to the labor market and the natural expectancy of merchants in respect to the merchandise market must be recognized to the same extent by courts of law and courts of equity and protected by substantially the same rules."

"It is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on either side of the market. The valuable thing to merchant and to customer, to employer and to employee, manifestly is freedom on both sides of the market. The merchant with his fortune invested in goods and with perfect freedom to sell, might be ruined if his customers were deprived of their freedom to buy; the purchaser, a householder, seeking supplies for his family, with money in his pocket and free to buy might find his liberty of no value and might suffer from lack of food and clothing if the shopmen who deal in these articles were so terrorized by a powerful combination as to be coerced into refusing to sell either food or clothing to him. * * *"

"A man establishes a large factory where working people reside, taking the risk of his being able to conduct his industry and offer these working people employment which they will be willing to accept. He takes the risk of destructive competition and a large number of other risks, out of which, at any time, may come his financial ruin and the suspension of his manufacturing works. But our law, in its recent development, undertakes to insure to him, not only that he may employ whom he pleases, but that all who wish to be employed by him may enter into and remain in such employment freely, without threats of harm, without unreason-

able molestation and annoyance from the words, actions or other conduct of any other persons *acting in combination.*" (Italics the court's.)

And in *Barr* v. *Essex Trades Council*, 53 N. J. E. 101 (1894), 30 Atl. 881 Vice-Chancellor Green said at page 112:

> "A man's business is property. By the first section of the bill of rights of the constitution of New Jersey, the right of acquiring, possessing and protecting property is classed, as a natural and inalienable right which all men have, with those of enjoying and defending life and liberty, and of pursuing and obtaining safety and happiness. This is an echo of Magna Charta repeated in the Declaration of Independence. Mr. Justice Bradley, in the Slaughter House Cases, 16 Wall. 36 (at p 116) says: 'For the preservation, exercise and enjoyment of these rights (life, liberty and the pursuit of happiness) the individual citizen, as a necessity must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect, *and a calling, when chosen, is a man's property and right.* (Italics the court's.) Liberty and property are not protected where these rights are arbitrarily assailed."

In *Brennan* v. *United Hatters*, 73 N. J. L. 729 (65 Atl. 165) the New Jersey Court of Errors and Appeals at p. 744, said:

> "Our Court of Chancery in Barr *v.* Essex Trades Council, 8 Dick. Ch. Rep. 101, 115; Frank & Dugan *v.* Herold, 18 Dick. 443, and Jersey City Printing Co. *v.* Cassidy, *Id.* 759, has affirmed the right of the citizen to conduct his business free from malicious interference, including his right to have free opportunity to hire employees. And we may remark that the right of one seeking employment to have free opportunity to gain employment, and to retain a position of employment once it is gained, is as precious in the eye of the law as the right of the employer."

And substantially the statement was repeated in *Jonas Glass Co.* v. *Glass Bottle Blowers' Asso.*, 77 N. J. E. 219, p. 223, 41 L. R. A. (N. S.) 445, 79 Atl. 262.

That right was expressly recognized by this court in *Truax* v. *Raich*, 239 U. S. 33, 38, 60 L. Ed. 131, 134 and *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 62 L Ed. 260, at p. 276.

It is a mistake to say that this right to the free flow of labor is any new right. It was recognized at common law. It was the basis of the rule at common law that it was an indictable conspiracy to entice away a servant which was the justification for the decision of the Supreme Court of New Jersey in *State* v. *Donaldson*, 32 N. J. L. 151 to the effect that it was an indictable conspiracy for several employees to unite to compel a person to quit his employment. It is a *necessary* right in the conduct of a business. It is as necessary as the right to be free to sell an article of commerce. What can it profit a man if he has the right to build a manufacturing establishment without unreasonable interference and to sell the product which he shall manufacture without such interference if he have not the right to obtain employees to manufacture the article without unreasonable interference?

That right is property. Being property, it is protected from being interfered with by the Legislature, both under the Constitution of the State and the Fourteenth Amendment of the Federal Constitution. It is not, I repeat, "a vested interest in the labor of workers." It is a vested interest in the right to make contracts, and to employ workers without unreasonable interference.

In *Allgeyer* v. *State of Louisiana*, 165 U. S. 578, 41 L. Ed. 832, this court said:

> "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by in-

> carceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, *and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*"

And to the same effect is *Lochner* v. *New York*, 198 U. S. 45, 49 L. Ed. 937.

I now come to a decision of this court which I urge clearly indicates that, if the statute is to be construed as the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26*, 126 Atl. 399, 96 N. J. E. 632, and as the court below, construed it, the act is unconstitutional, *i. e.*,

Traux v. **Corrigan, 257 U. S. 320, 66 L. Ed. 254.**

In that case there came before this court the refusal of the Supreme Court of the State of Arizona to grant an employer an injunction against a conspiracy and boycott, one of the concomitants of the conspiracy and boycott being picketing. The Supreme Court of Arizona rested its decision upon a statute of Arizona which, as construed by that court, prevented it from prohibiting picketing so long as peaceful, and, as the late Chief Justice of this court said in delivering the opinion of this court:

> "The effect of this ruling is that, under the statute, loss may be inflicted upon the plaintiffs' property and business by 'picketing' in any form if violence be not used, and that, because no violence was shown or claimed, the campaign carried on, as described in the complaint and exhibits, did not unlawfully invade complainants' rights."

This court held that the statute was unconstitutional both as a taking of property without due process of law and a denial of the equal protection of the law. It said:

> "The opinion of the State Supreme Court in this case, if taken alone, seems to show that the statute grants complete immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful. * * *"
>
> "It is argued that while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the State for maintaining peace, good order and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the State may withdraw all protection to a property right by civil or criminal action for its wrongful injury, if the injury is not caused by violence."

It was sought to sustain the statute under *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 61 L. Ed. 667, upon the ground that the State had control over the relations of employees and employers and that they were a class by themselves. This court said, 66 L. Ed. 261:

> "These cases, all of them, relate to the liabilities of employers to employees growing out of the relation of employment for injuries received in the course of employment. They concern legislation as to the incidents of that relation. They affirm the power of the State to vary the rules of the common law as to the fellow-servant doctrine, assumption of risk, and negligence in that relation. They hold that employers have no vested right in those rules of the common law. The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute, is manifest upon its statement. It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a

State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

This court held that, if the statute should be construed as merely to withhold from the parties a remedy through equitable relief by injunction, it was void as denying the equal protection of the law.

The court said that the classification of employers in the manner created by the statute was illusory, and,

"Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world, and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. *The Constitution was intended —its very purpose was—to prevent experimentation with the fundamental rights of the individual.* We said through Mr. Justice Brewer, in Muller *v.* Oregon, 208 U. S. 412, 52 L. Ed. 551, 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.' "

* * * * * * *

"It seems a far cry from classification on the basis of relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so, in respect of torts thereafter committed by such ex-employee, on the business and property right of the employer. It is really a little difficult to say, if such classification can be sus-

> tained, why special legislative treatment of assaults upon an employer or his employees by ex-employees may not be sustained with equal reason. It is said the State may deal separately with such disputes because such controversies are a frequent and characteristic outgrowth of disputes over terms and conditions of employment. Violence of ex-employees toward present employees is also a characteristic of such disputes. Would this justify a legislature in excepting ex-employees from criminal prosecution for such assaults, and leaving the assaulted persons to suits for damages at common law?"

The dissenting opinion of Mr. Justice Holmes, in which he says:

> "By calling a business 'property' you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed."

indicates to what extent the prevailing opinion went.

Mr. Justice Pitney in the Truax case thought that the State of Arizona might properly refuse to permit employers to obtain *equitable* relief by injunction, the Justice stating:

> "And just as one state might establish such protection by statute, so another State may, by statute, dis-establish the protection, even as States have differed in their judicial determination of the general law upon the subject."

The majority of the court, however, did not accede to that view.

If the statute has the construction placed upon it by the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26,* 96 N. J. Eq. 632, 126 Atl. 399, then——the judicial department of the State of New Jersey, by its construction of the law and the statute, (and the District Court by following that construction)

has permitted the taking of the property of an employer without any process whatever and has permitted a discrimination based upon the fact of residence alone, a discrimination between citizens of one State and those of another. The effect is much more widespread and ruinous to employers of labor than was the effect of the action of the Supreme Court of Arizona in denying relief in a case of peaceful picketing. It is therefore, by the action of the State, through its legislature in adopting the statute and its judicial department in constructing it, that the constitutional rights of Barker are invaded.

The statute of New Jersey, P. L. 1883, as construed by the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26,* 96 N. J. Eq. 632, 126 Atl. 399 is unconstitutional and the court below erred in giving any force or effect to it.

CONCLUSION.

In conclusion I submit to your Honors that if unions are permitted to use the weapon of the strike to enforce a discrimination such as is here involved, merely because that discrimination has to do with the matter of wages, however arbitrary the classification may be, then it will not be difficult to devise means whereby, under the law, the business fabric of the country can be torn apart and the present social system completely destroyed; that if discrimination of this kind is permitted by combinations of labor unions, employers must be accorded the same right as against labor unions, for, as this court said in *Coppage* v. *Kansas,* 236 U. S. 1, 59 L. Ed. at p. 448:

> "And can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers?"

Employers, therefore, must be permitted to combine to discriminate against employees upon any conceivable ground, however arbitrary.

Instead of a government of law, in which each man is free, enjoying equal rights with his fellows, we will have a government of labor unions and combinations of employers.

For the reasons aforesaid it is submitted that the decrees of the court below should be reversed and the record remitted to the District Court with instructions to enter a decree granting the plaintiff the relief prayed in its bill.

Respectfully submitted,

MERRITT LANE,
Attorney for and of counsel with Barker Painting Co.,
Plaintiff below and Petitioner here.

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APR 21 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 477. October Term, 1929.

BARKER PAINTING COMPANY,
Petitioner,

and

LOCAL No. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, *et als.*,
Respondents.

MEMORANDUM OF UNREPORTED CASES.

MERRITT LANE,
Attorney for and of Counsel with Petitioner.

Arthur W. Cross, Law Printer, 31-37 Lafayette Street, Newark, N. J.

Supreme Court of the United States

BARKER PAINTING COMPANY, *Petitioner,* *and* LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, *et als.*, *Respondents.*	*On Certiorari.* *No. 477 October Term, 1929.*

MEMORANDUM OF UNREPORTED CASES.

State of Rhode Island and Providence Plantations.
PROVIDENCE, *sc:*

SUPERIOR COURT.

Eq., No. 7502.

GEORGE A. DOUGLAS & BROTHER, INC.,

vs.

CLARENCE MALLETTE ET AL.

Rescript.

BAKER, *J.:*

Heard on prayer for a preliminary injunction to restrain the respondent from preventing the employment of certain members of the Painters' Union on work in the City of Providence at the scale of wages and under the terms and conditions regularly recognized by the Painters' Local Union for work in said Providence.

The single question in issue in this case relates to the legality or illegality of certain sections of the constitution of the National Union of Painters, Decorators and Paperhangers of America, as passed at one of the general conventions of said Union.

The rules or sections in question provide in substance that where there is a difference between the wage scales of two cities, all members of the Union employed upon a job done in one of two cities by an employer from the other shall receive the higher of the two wage scales, and if there is a difference in the work day, the shorter will prevail. They also provide that at least 50% of the employees shall be from the locality in which the work is being done. These rules or sections are enforced by penalties imposed upon the members of the Union by the Union itself.

The evidence in this case shows that the complainant is a Connecticut corporation located in Bridgeport in said State. It took a contract to do certain painting in the City of Providence in this State. The wage scale as recognized by the Union in the City of Bridgeport is $9 per day for a day of eight hours and five days per week. The scale of wages in effect in the City of Providence as recognized by the local Union is $8 a day for an eight-hour day for five and a half days per week. The complainant brought with it to the City of Providence a man named Purdy as foreman, to whom it paid the Bridgeport rate of wages. It employed in Providence several Union painters to whom it paid the Providence rate. Work was done under the contract for a short time, when the matter came to the attention of the business agent of the Providence Union. He had a conference with the employees on the job and after some little delay the men, including Mr. Purdy, stopped work. The complainant's affidavits tend to show that the business agent of the Providence Union called the men out. He testifies, however, that he merely called the attention of the men to the rules above referred to and explained to them that they were violating those rules and under the regulations of the Union became liable to a fine, and that thereupon the men stopped work of their own volition. This seems to be the only question of fact in dispute.

The rules of the Union in question have been passed upon recently by a few courts in cases where the facts very strongly resemble the situation in the present case. There are two sharply defined and distinct lines of cases. In Hass, Inc., *vs.* Local Union No. 17, &c., 300 Fed. Rep. 894, decided in the U. S. District Court for the District of Connecticut, the Court held, in a rather brief opinion, that it would refuse on motion to dismiss a bill of complaint similar to the bill in the case at bar. The decision seems to rest on an opinion rendered in the New Jersey Chancery Court, which said opinion has since been overruled by the Court of Errors and Appeals in New Jersey, and on an opinion of a lower court in the District of Columbia. The other line of cases holds that in a proceeding such as this the complainant is not entitled to relief.

N. J. Painting Co. *vs.* Local No. 26, &c., 126 Atl. Rep. 399.

This case reversed the decision of the N. J. Chancery Court above referred to.

In the case of H. Newton Marshall *vs.* Brotherhood of Painters, Decorators and Paperhangers of America, &c., No. 10111, March Term 1925, Common Pleas No. 1, Philadelphia, Pa., a decision of a lower court, the opinion of the New Jersey Court of Errors & Appeals, *supra,* was followed, denying the complainant relief.

After careful consideration of the question involved, the Court is inclined to follow the law as laid down in the case of N. J. Painting Company *vs.* Local Union No. 26, *supra.* The case of Hass, Inc., *vs.* Local Union No. 17, *supra,* seems to be decided on the theory that the rules in question are in restraint of trade, tend to discriminate unjustly against contractors and bidders away from the locality where the work is being done and that the public is injured.

The Court finds itself unable to follow this line of reasoning entirely. In the judgment of the Court the rules in question are not in restraint of trade within the generally accepted meaning of that phrase. It should be noted that the rules under discussion are regulations of the Painters' Union and are not public statutes. If the public is injured in any way by the enforcement of the rules in question, which fact the Court does not believe, it is certainly a very remote injury. While perhaps it is true that the regulations under discussion may operate incidentally in some cases against contractors and bidders away from the locality where the work is being done, this does not necessarily make the rule illegal in the judgment of the court.

It would appear to the Court that the rules and regulations in question are directed at no one person or no one contractor in particular. They are not aimed at the complainant nor at out of town contractors in general. They apply to all union work over the entire United States.

In the judgment of the Court the fundamental purpose of the sections and rules in question is to regulate wages, methods, and hours of work. The rules were apparently passed in good faith by the Union for the regulation of its own affairs, and not for the purpose of discriminating against any one, or of restraining trade or of injuring the public. They obviously have in mind the establishing of a sliding scale of wages. It would seem clear that from the point of view of the Union it would be unwise to have different members of the Union from different localities working on the same job in the same place receiving different wages for doing the same work. It clearly became necessary for the Union to regulate this matter by some rule; particularly as it is common for large employers at the present time to take contracts away from the locality in which they are situated, and frequently to move

their own employees from place to place on different jobs. Apparently the Union had the choice of fixing the wage scale at the higher of the two, where there was a difference in the wage scales of the localities, or at the lower of the two, or at the scale of wages prevalent in the place where the work was being done. Perhaps this latter might have been fairer, or the more reasonable regulation, but that is open to argument, is a question upon which all might not agree, and the whole matter in any event is one relating to the internal affairs of the Painters' Union. If the Union had provided that the lower of the two wage scales prevailed, or that the wage scale of the place where the work was being done governed, the Court can readily see where, as in the instant case, men employed in Bridgeport at $9 a day might well refuse to come to work in Providence at $8 a day. Further, if the lower of the two wage scales should be selected, the Court can easily imagine a case where a local contractor living in the place where the wage scale was high might be just as much discriminated against in bidding as the complainant contends it is.

The Union has seen fit to provide that under the facts of such a case as is now before the court the higher of the two wage scales shall prevail, and the Court sees nothing illegal in such a regulation.

There is no question, of course, at the present time but what employees have a perfect legal right to fix a price upon their labor and to refuse to work unless that price is obtained, and they have this right not only as individuals but also in combination. They have the right to strike if such strike is conducted in a lawful manner and for no unlawful purpose. Of course, if the purpose of the strike is illegal, or the means employed in conducting the strike are unlawful, then the Court should give relief by way of injunction. But that does not seem to be the situation in the case at bar. This is not an instance where any unlawful means have been attempted to be used.

On the facts, therefore, as shown by the testimony in this case, and on the law, the Court is of the opinion that the complainant is not entitled to a preliminary injunction and the prayer for the same is denied.

C. P. No. 1.

No. 10111, March Term, 1925.

In Equity.

H. NEWTON MARSHALL, *Trading as* H. NEWTON MARSHALL COMPANY, *Plaintiff*,

vs.

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA ET AL.

Opinion.

This case came on to be heard on Bill to temporarily restrain the Local Unions affiliated with the National Union from causing or threatening a strike of Union Painters upon certain contracts which Plaintiff has for painting in Philadelphia. The Plaintiff is a Boston corporation.

Subsequently an Answer was filed and the case then proceeded as upon Bill, Answer and Replication for Final Hearing.

The Bill alleges that Defendants are local unions affiliated with the National Union of Painters, Decorators and Paperhangers of America; That the Constitution or By-laws of said Union provide, *inter alia*—

> "*Section 132.* Neither the General Executive "Board nor any other authority shall have power "to grant exclusive or special privileges to any

"local union or district working under a charter "of this Brotherhood; nor shall the G. E. B. or "any other authority be invested with power to "force any employer to bring men from one city "to work in another city if union men can be pro- "cured in such city where the work is to be erected "and finished. All conditions of such localities "shall be strictly adhered to, the shorter work day "and the higher scale of either locality to prevail "in all cases. A card fully paid up, regardless of "where it is issued, shall entitle the holder to the "right to work in any city provided he conforms "with the working rules and conditions of the "locality and that no strike or lock-out exists in "that locality.

"When a contractor, builder or boss painter does "any work pertaining to our trade outside his home "city or town—and in a locality where a District "Council or a Local Union exists—not less than fifty "(50) per cent. of the men in such district shall be "employed on all work coming within the jurisdic- "tion of the Brotherhood of Painters, Decorators "and Paperhangers of America as defined in the "General Constitution."

"*Section 133.* A member leaving the jurisdic- "tion of the local union in which he is a member "to work for his employer on a job in the jurisdic- "tion of another local union must comply with the "working rules of that locality and demand in all "cases the shorter work day and the higher scale."

"*Section 255.* When any difficulty arises between "the members of any local union and their em- "ployers, the members shall lay the matter before "the local union or district council, in special meet- "ing assembled, and, if they be endorsed, the Presi- "dent shall appoint an arbitration committee to "wait upon the employers and endeavor to adjust

"the difficulty. Said committee shall report at the "next stated meeting and, if no adjustment can be "effected, the local union or district council shall "then take such course as is prescribed in this con- "stitution. Where district councils exist, strikes "and lockouts shall be under their supervision. "They shall however, be governed by the provisions "of this constitution."

"*Section 271.* Any member who acts in violation "of his obligation or who violates any article or "section of the constitution of the Brotherhood or "the By-laws of a local union, shall be fined or ex- "pelled at the discretion of the local union.

"Local Unions of special branches shall have the "power to enforce and collect fines for all viola- "tions of the special trade rules of that particular "branch of the trade."

The Bill likewise alleged a written agreement entered into between Plaintiff and District Council No. 21, wherein it was alleged Defendants agreed to work for Plaintiff at the Philadelphia rate for labor (see Exhibit C of Bill).

That the rate of wage for similar labor in Boston is One Dollar and ten cents ($1.10) per hour and in Philadelphia One Dollar ($1.00) per hour; that Defendants have refused to work for Plaintiff except at the Boston rate, in accordance with the By-laws and Constitution of their National Order (see *supra*), and that such a provision is a restraint of trade upon Plaintiff and unfair discrimination.

Defendants filed an Answer to this Bill denying the material allegations thereof, admitting their refusal to work except under their Constitution and By-laws, and denying also that said letter offered in evidence as a contract binding upon the Defendant Local Union No. 21 was of any binding force except when Plaintiff opened up a

regular place of business here, and became a local contractor.

The bill prays for specific relief, as follows:

"*(a)* From ordering, advising, encouraging, "participating, persuading or contributing money "or advice to any strike or cessation of work of "any of plaintiff's employees, upon the ground that "plaintiff has declined to pay a higher rate of "wages and to observe union conditions more "favorable to the defendants than those prevailing "in the district in which the work is being done, "or to pay a higher rate of wages and to observe "union conditions more favorable to the defend- "ants than those which contractors engaged in a "similar business in said districts are required to "pay or for the reason that plaintiff has employed "painters who are not members of the Brotherhood "of Painters, Decorators and Paperhangers of "America because of the refusal of the members "of said union to work for the plaintiff unless and "until plaintiff should comply with the rules and "regulations referred to in this bill.

"*(b)* From ordering or suggesting to any per- "son or persons, including members of the "Brotherhood aforementioned, its district councils "and/or local unions affiliated therewith, that they "should refrain from entering the employ of the "plaintiff, and from proceeding in any manner "whatsoever to discipline any union members for "working for the plaintiff, and from doing any act "or thing whatsoever to restrict the plaintiff or his "employees from the free and unhindered control "and conduct of the plaintiff's business.

"*(c)* From entering upon the work upon which "plaintiff is engaged and/or from approaching any "employees of the plaintiff, whether members of

"the union or not, for the purpose of interfering "in any way, shape or manner whatsoever between "the plaintiff and his employees, upon the ground "that the plaintiff should pay the rate of wages "and observe the union conditions prevailing in the "city of Boston, or elsewhere, rather than those of "the place in which the work is being done.

"*(d)* From enforcing or attempting to enforce "any provision, rule or order of the Brotherhood "of Painters, Decorators and Paperhangers of "America, or of any of the district councils or local "unions affiliated therewith, or of any of the offi- "cers or agents of said organizations, which would "require the plaintiff, where there is a difference "between the wage scale in the city where the plain- "tiff's main place of business is located and the "district where the work is being carried on, to pay "the higher of the two wage scales and to observe "the union conditions more favorable to the de- "fendants.

"*(e)* From interfering with the employment by "the plaintiff of workmen of any kind, whether "union members or not, upon the wage scale and "under the conditions existing in the district in "which the plaintiff is engaged in work.

"*(f)* From going on strike or threatening to go "on strike, or ordering or attempting to cause any "of the defendants, or any of the members of the "various district councils or local unions affiliated "with the Brotherhood of Painters, Decorators and "Paperhangers of America to go on strike on any "job or jobs where or because the plaintiff declines "to comply with Section 132 of the Constitution of "the Brotherhood of Painters, Decorators and Pa- "perhangers of America, or any other provision "or rule of the said Brotherhood, and/or any dis- "trict councils, and/or any local unions affiliated

"therewith, under the terms of which plaintiff would "be compelled to pay a rate of wages and to ob- "serve union conditions other than those prevail- "ing in the district in which he is engaged upon "his work.

"*(g)* From any and all acts and from the use "of any and all ways, means and methods which, "by putting or attempting to put any person, firm "or corporation in fear of loss or trouble, will tend "to hinder, impede or obstruct the plaintiff from "obtaining contracts for work, or workmen to per- "form its contracts when obtained.

"*(h)* From making or circulating in any way "any statement that the defendants or members of "unions affiliated in any way therewith, will refuse "to work for the plaintiff or from any person, firm "or corporation employing or entering into con- "tract with the plaintiff.

"*(i)* From combining or conspiring in any way "to prevent the employment of or the entering into "contract with the plaintiff by any such person, "firm or corporation as may desire to employ or "enter into contract with him.

"*(j)* From calling, suggesting, or in any way "aiding in a sympathetic strike or strikes, and from "carrying on any boycott of the plaintiff."

Requests for Findings of Fact and Conclusions of Law were filed by the Plaintiff, which have been considered by the Court, as suggestions in accordance with Rule 67 of the New Equity Rules.

From the Bill, Answer, Replication and Testimony taken, the Court finds the following:

Facts.

I. Plaintiff is a contractor, in the business of Painting, whose place of business is in the City of Boston, State of Massachusetts, and carries on said business throughout the United States.

II. That in carrying on said business, where he secures work in localities other than Boston, he secures the necessary materials through his Boston office from dealers in the vicinity of Boston, and ships same to the locality where such work is to be done

III. Plaintiff has secured two contracts in the City of Philadelphia for painting and decorating (Exhibit A and B of Bill).

IV. The plaintiff employed a foreman and one man, an apprentice, members of Philadelphia Local Union, on one of the contracts, and offered to pay the Philadelphia rate of wages of One Dollar ($1.00) per hour.

V. The rate of labor in Boston for the same class of work is One Dollar and ten cents ($1.10) per hour, in Philadelphia, One Dollar ($1.00) per hour.

VI. The defendants advised those employed by Plaintiff of the rules governing the Union, and their liabilities to fines and dismissal from the same, but called no strike or threatened none up to the filing and hearing of said Bill.

VII. That a conference was held between Plaintiff and Defandants' representatives and said letter (Exhibit C of Bill) was discussed and Plaintiff was advised that it was not considered binding, but to present the matter to the Council, which was then sitting, which was not done.

VIII. Defendants offered to supply all the men necessary to Plaintiff under the scale of wage paid by Plaintiff in Boston, to wit: One Dollar and ten cents ($1.10) per hour, as required by its constitution and rules.

IX. Plaintiff has declined to pay said Boston scale of wages and insists upon the Philadelphia rate of One Dollar ($1.00) per hour.

X. There is no evidence produced that Defendants have called any strike on Plaintiff's work, or asked that any sympathetic strike be called on any of Plaintiff's other contracts throughout the country.

XI. The rate of wages for the same class of work varies in different cities and localities. In New York, it is One Dollar and thirty-one and one-quarter cents ($1.31¼) per hour; Pittsburgh, One Dollar and Forty-three and three-quarter cents ($1.43¾) per hour; Philadelphia, One Dollar ($1.00) per hour; Lawrence, Mass., One Dollar ($1.00) per hour, and in some Southern cities, it is less than One Dollar ($1.00) per hour; Chicago, One Dollar and fifty cents ($1.50) per hour, and in Washington, D. C., One Dollar, twelve and one-half ($1.12½) per hour.

Discussion.

The Plaintiff is a Boston contractor and in the year 1923 had a contract to paint the Victor plant in Camden, New Jersey. At that time, the rate of wage in Boston was One Dollar and ten cents ($1.10) per hour and in Philadelphia One Dollar ($1.00) per hour, and the same questions arose as in the case at bar. It was finally adjusted and the Boston rate paid.

The letter offered in evidence as being a binding contract to furnish men on all future work obtained by the Plaintiff in this locality was signed. We do not agree with Plaintiff that his interpretation thereof is correct, as the testimony clearly showed that it was merely the understanding of the representative of the Union who settled the Victor contract dispute; *i. e.*, Should Plaintiff become a local contractor with an established place of

business in Philadelphia, then he would be furnished Union men at the Philadelphia rate, as all other Philadelphia contractors employing union labor, are.

The present dispute arose over two contracts which Plaintiff has secured in Philadelphia and raises the question whether the Union has under its constitution and rules a right under existing laws to enforce them, or whether such rules and regulations are not in restraint of trade, and unjust discrimination between local and foreign contractors.

From the testimony, it appears Plaintiff, at the time of entering into the Victor contract also had a contract in Lawrence, Mass., where the rate of wage was One Dollar ($1.00) per hour; that it had established for that work a local branch of its Boston office, and endeavored to bring men from Lawrence to Camden, so as to obtain local union men here at the same rate of wage, to wit: One Dollar ($1.00) per hour.

In this they were unsuccessful. In the present case, plaintiff has opened a local office, merely for the superintending of the work here, and not as a permanent place of locality for the conduct of its general business, and consequently, not in conformance with the alleged contract. (Exhibit C of Bill.)

If this then be a contract, it raises the main question as to whether the provisions of the National Union's Constitution and rules, to which all Districts and Locals are subject is in restraint of trade and creates an unfair discrimination.

There is no evidence before this Court of any threats to prevent one from working for Plaintiff, or of any strike called by Defendants, but on the contrary, the evidence shows that Defendants will furnish men at the Boston rate of One Dollar and ten cents ($1.10) per hour,

but the Union men will not work for less, being an outside contractor.

The rule of the organization above referred to does not in our judgment create a discrimination against this particular employer, nor is it in restraint of trade.

> "Employees have a right to fix the price upon "their labor, and to refuse to work unless the price "is obtained. They have that right both as indi- "viduals and in combination. They may organize "to improve their condition and to secure better "wages."
>
> New Jersey Painting Co. *v.* Local No. 26, 126 Atl. 399.
>
> Maryland Lodge *v.* Adt., 100 Md., 249.
>
> Natl. Protective Asso. *v.* Cummings, 170 N. Y., 16 R. L. C., P. 432, Sec. 16, 321.

As was said in New Jersey Painting Co. *v.* Local No. 26, *supra*,

> "The Rule adopted and promulgated by defend- "ants is not aimed at and does not apply to the "Complainant solely. It does not seek to establish "arbitrary discrimination between one person or "Corporation and another. It applies to all em- "ploying painters within the whole territory of the "United States, who undertake to do work outside "of their home districts. It applies to all alike "automatically who come within the prescribed "rule."

The cases relied upon by the Plaintiff in this case are all cases wherein the Union to enforce some of its claims, sought to do so by means which were unlawful irrespective of any statute upon the questions involved and where such a question arises, the courts will act promptly to restrain them. Unions have the right to strike conceded by the plaintiff, where such strike is conducted in a law-

ful manner and they likewise have the right to peaceably persuade workers from taking their places where a strike is in progress, but when they go beyond the lawful means, Courts are quick to act.

The question here presented raises one upon the idea that a Union cannot in good faith frame or adopt a rule providing for a sliding scale of wages to fit ostensibly the varying local economic conditions that such regulations create an unfair restraint of trade; that is, its effect upon the employer. As was said in N. J. Painting Co. *v.* Local No. 26, *supra*—

> "The law gives the defendant a right to sell their "labor to whom they please, when and under such "conditions as they may fix, individually or in com- "bination. They may make rules and regulations "passed in good faith, providing for what they may "deem to be an economic advantage to themselves; "if in the enforcement of such rules and regula- "tions, they violate no law, but act solely for the "declared purpose, the Courts ought not and cannot "legally enjoin them from such concerted action, "simply because such action may affect some em- "ployers. * * * "

We cannot agree with the conclusion reached in the case of Hass *v.* Local Union No. 17, 300 Fed. Rep., 894, wherein it was held, *inter alia*,—

> "The effect of the rule in question is to make it "difficult, if not impossible, for an outside con- "tractor. * * * The injury thus inflicted on the "outside contractor and the public cannot be justi- "fied, since no legitimate interest of the defendants "would be furthered by the operation of the rule "in question."

We do not see how the public can be injured by any such means.

As shown by the testimony and under our view of the law, this rule is one passed for the sole benefit of the Union and its members, in total disregard of the contractor, and having, as before stated, the right to fix the price of their labor, it is not a restraint on trade, nor does it create unfair competition as long as the Union uses lawful means to enforce their rules.

The evidence discloses that in all cases brought to the attention of the Court, where other than Local contractors had work in this jurisdiction, the higher rate prevailing in his home district, was paid by the contractor. In fact, the Plaintiff himself has done the same in other jurisdictions.

The provisions of Section 132, provide, *inter alia*—

> "All conditions of such localities shall be strictly "adhered to, the shorter work day and the higher "scale of either locality to prevail in all cases."

The purpose of such a clause or rule is to establish a standard rate of wages. There is no evidence of anything unlawful having been done.

For the foregoing reasons and under the foregoing authorities, we conclude there is no reason shown for the exercise of Injunctive Relief, and the Bill, therefore, should be dismissed.

Conclusions.

1. There is no ground shown for equitable relief and the Bill should be dismissed.

2. The Bill is dismissed at the cost of the Plaintiff.

The Prothonotary will notify the parties hereto of the above Findings and Conclusions so that exceptions thereto may be filed within ten days, if desired.

BARTLETT, *P. J.*

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between

J. D. LOIZEAUX LUMBER CO.,
Complainants,

and

CARPENTERS' AND JOINERS' LOCAL OF ROSELLE, N. J., and ELIZABETH, N. J., No. 350, *et als.*,
Defendants.

} *Conclusions.*

On Motion for Preliminary Injunction.

BUCHANAN, *V.-C.*

Complainant is a manufacturer of and dealer in building material (lumber and mill work), operating an "open shop,"—that is, employing men irrespective of whether or not they are members of the Union. There are ten other similar concerns in Union County, of which nine operate as "closed shops," that is, they employ none but union labor, and in return for such agreement the unions authorize and permit them to place the union label on the material turned out by them. Complainant, of course, has no right to use, and does not use, the union label on its material. Its employees are satisfied with the conditions of their employment. There is no strike.

The union in question is the United Brotherhood of Carpenters and Joiners of America, an unincorporated association of some four hundred thousand members belonging to some twenty-seven hundred local unions or branches in various municipalities in the United States and Canada. Two of these local unions, No. 350, of Ro-

selle and Elizabeth, and No. 155 of Plainfield, and their respective business agents, William Roehner and William Lunger, are the defendants who have been served and appeared. (Service of the Order to Show Cause was not obtained on the International Body.)

Clearly the two defendant locals are seeking to compel the unionization of Defendant's Plant and also the only other open shop plant in the country, and thus to complete the unionization of all the wood working mills in Union County at least. (As a matter of fact, the field covered by the eleven mills in Union County spreads out over parts of adjoining counties as well.) At meetings in April, last, the two defendant locals decided that "in future the members engaged as outside carpenters insist that all sash, frames, doors, and other detail mill work erected by them on buildings bear the union label of the United Brotherhood of Carpenters and Joiners of America." Since only closed shops where only union men are employed can use this label, this is obviously an insistment that all the wood working mills in Union County—all such mills wherever situate supplying material to be used in Union County shall be closed union shops.

The purpose of the defendants, therefore, is unlawful—not considering for the present what acts, if any, have been done by defendants in the carrying out of that purpose. The purpose is unlawful because it is to establish a monopoly of Union labor in the Mill work industry in Union County and vicinity at least, and that is against public policy. *Baldwin Lumber Co.* v. *International Brotherhood of Teamsters*, 91 N. J. Eq. 240 at 248, and cases cited. In that case there was a strike, the purpose whereof was *inter alia* to compel complainants to agree to employ none but union labor—to conduct closed shops. A strike is lawful if it is not for an unlawful purpose, and if it is not carried on in an unlawful manner. In the Baldwin case this court held not only that the strike

was being carried on in an unlawful manner and that such unlawful acts should be enjoined, but also that the strike itself, being for the unlawful purpose of establishing a monopoly as aforesaid was unlawful, and that therefore the defendants should be enjoined,

> "from promoting, encouraging, directing, participating in, in any manner whatsoever, the strike against the complainants; from contributing money or advice towards the success of the strike."
>
> "From advising with, participating in, encouraging, persuading, or consulting with striking employees of complainants or others, with the design of securing agreements from complainants by which they agree to employ none but Union labor."

(these being the "subdivisions A and B of the prayer of the Bill," mentioned on page 250 of the opinion). In other words, that the strike itself should be enjoined.

For the same reason, then, the defendants here should be enjoined from committing any acts in the carrying out of this unlawful purpose, however lawful in themselves such acts might otherwise be—if they have in fact committed or threatened acts in pursuance of this unlawful purpose which have resulted or are likely to result in irreparable injury to complainant.

That defendants have done acts towards the accomplishments of this purpose is admitted by defendants—though there is dispute as to just what those acts have been. That the result of those acts—even those which are admitted by defendants—has already caused serious injury to complainant, and will, if continued, cause irreparable injury to it, is amply established by complainant's affidavits, and is not denied by defendants' affidavits, nor disputed in their argument.

As appears by defendants' affidavits, the International or "parent" union, has a rule of which the part here pertinent is as follows:

> "It shall be the duty of all * * * local unions and each member * * * to make it generally known to the members of the local union that it is *necessary* (italics mine), to all members and the United Brotherhood that products made in factories * * * where only members of the United Brotherhood are employed, should be installed by fellow members."

In other words, this is clearly a notice or direction from the parent body to the local and their members that only products made in closed union shops should be installed by members of the union. It is true that the word "only" does not appear in the rule—but is equally true that it is meant to be understood as though it were there. This cannot be denied without depriving the word "necessary" of all force and effect and depriving the "rule" itself of meaning and of purpose.

A few weeks before the filing of the bill, each defendant local union adopted the rule herein earlier referred to namely,

> "That in future the members engaged as outside carpenters *insist* (italics mine), that all * * * mill work erected by them on buildings bear the union label (*i. e.*, come from a closed union shop)."

"Insist" is antonymic to "yield." Where, as here, it qualifies something which the person who insists is himself to do or not to do. It excludes or is contrary to the idea of acting otherwise than in accordance with the thing insisted upon. If the members erect non-union mill work, they do not insist that only union mill work be erected by them. Insisting that all mill work erected by them be union made means refusing to erect non-union mill work.

This is indeed not controverted by defendants. They say that these rules are not mandatory; that there is no punishment for violation by a member; that no punishment has been threatened by the unions upon members who violated the rule; that it is a matter for each member to decide for himself. Assuming all this to be so, the argument is obviously specious. We are not here concerned with whether or not a member may or may not be punished for violating the rule. The significant thing, and the only significant thing, is that the adoption of the rule by each local union was an action of the union—was a collective agreement by the members of the union, that they would, in effect, refuse to erect a non-union millwork. Each man individually might lawfully refuse to erect and refrain from erecting non-union millwork, but for any man to so refuse, in pursuance of a combination or agreement is another matter.

Subsequent to these "decisions" or agreements of the local unions, the two individual defendants, Roehner and Lunger, as business agents of the respective locals, went about amongst the members of their unions, on the several construction jobs on which they were working and spoke to the men, about this rule—as a part of their duty when they "see the rules of said union not being adhered to;" and also told some of the master builders and contractors of the rule. This is all admitted by Roehner and Lunger.

The allegations in complainant's affidavits are to the effect that Roehner and Lunger did more than this; that they told quite a number of the master builders and contractors who were using millwork bought from complainant that complainant was to be compelled to unionize its shop, and that they must not erect millwork bought from complainant, that if they did, their jobs would be declared unfair, and the men would be fined or called off from work.

Defendants' affidavits deny that complainant's name was mentioned, or that any threats were made. Without going into detail, a comparison, weighing, and analysis of the affidavits on both sides satisfies me that threats were made as alleged.

However, accepting as the fact simply Roehner's and Lunger's own affidavits of what they did, the result would be the same. There were only two non-union mills in the county, complainant's and one other This other, as defendants knew, was willing to unionize its shop if complainant would do likewise. It was primarily complainant's shop, therefore, which defendants were seeking to compel to be unionized. Moreover, the thing would be no different, if their acts were directed against two mills instead of one. A boycott is not made lawful because directed against two mills instead of one.

On their own showing, defendants formally agreed that the union members should erect only union made millwork —should not erect non-union millwork. They spread notice of this agreement of resolution amongst the members who might not have been present at the meeting. They also notified the master builders and contractors of this action. To say that this does not amount to an agreement to boycott non-union millwork and a threat thereof to the contractors, is to cast aside common sense. These were men, dealing with men, about matters that concerned their livelihood—not children playing with children. They were not passing resolutions by way of pastime, not talking mere persiflage. Their threats were none the less threats merely because they were not expressed in A. B. C. language. They were meant to be understood, as threats, and they were so understood. Defendants do not say that they told the men or the contractors that these rules were not enforceable and that it was a matter for each union man to decide for himself.

The thing which was agreed upon, and which was threatened, was a boycott, such as a boycott of the complainant by the contractors themselves would have been. It is unlawful—certainly at least under the circumstances of this case.

> "Intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong." *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. Div. 598, at 613."

This statement, after being cited with approval and followed by Vice-Chancellor Green, in *Barr* v. *Essex Trades Council*, 53 N. J. Eq. 101, at 117, was enunciated as the law of this state by the Court of Errors and Appeals in *Brennan* v. *United Hatters, &c.*, 73 N. J. L. 729 at 745.

If these defendants should do that which they have threatened to do, they would, of course, thereby damage complainant's property and trade; equally of course, they would be acting intentionally. They would therefore be guilty of an actionable tort unless there be just cause or excuse on their part for so doing.

The only matter set up or suggested by defendants by way of just cause or excuse, is the advancement of the interests of the union and the betterment of the condition of the members. Such objections and purposes are entirely lawful and praiseworthy in themselves, but they do not constitute just cause or excuse for the threatened acts and injuries.

It is immaterial that no actual refusal to erect complainant's millwork has occurred. It is the function of equity to prevent threatened injury—to save complainants from the damage which could not be adequately redressed at law. Where it appears, as it does in this case, that such

wrongful acts and injuries have been threatened and the facts and circumstances show, not a mere unsupported fear by complainants of possible harm, but a reasonable and probable expectation that the threats will be carried into execution to their damage, complainants are entitled to restraint.

I will advise an order for restraint *pendente lite*, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

THE AEOLIAN COMPANY; RUDOLPH WURLITZER COMPANY; M. P. MOLLER, INC., ESTEY ORGAN COMPANY; SKINNER ORGAN COMPANY; and AUSTIN ORGAN COMPANY,

Plaintiffs-Appellants,

—against—

JACOB FISCHER, Individually, etc., *et als.*,

Defendants-Appellees.

Before: MANTON, A. N. HAND and CHASE,
Circuit Judges.

Appeal from the District Court for the Southern District of New York. Suit by plaintiffs for an injunction restraining the defendants' interference with their interstate commerce and committing acts in violation of the Sherman Anti-Trust Act, as amended by the Clayton Act. Decree for defendants; plaintiffs appeal. Reversed.

PAVEY & HIGGINS, ESQS.,
Attorneys for Appellants.

WALTER GORDON MERRITT, ESQ.
JAMES C. HIGGINS, ESQ.
of Counsel.

JAMES E. SMITH, ESQ.,
Attorney for Appellees.

MANTON, Circuit Judge.

The appellants appeal from a decree dismissing the bill of complaint after final hearing. The suit seeks to restrain the appellees, labor unions and individuals associated with them, from combining to restrain interstate commerce and destroying the business of the appellants by calling strikes or threatening to call strikes in building trades employed on buildings where the appellants were installing their organs, sold and shipped in interstate commerce. The case was here before (Aeolian Co. *v.* Fischer, 29 Fed. (2d) 79) where we affirmed an order denying the application for a preliminary injunction.

All the appellants, but one, are foreign corporations and are organ manufacturers selling their product in interstate commerce to moving picture theatres, churches and for private uses. The contracts are interstate in their nature and provide for the building, shipping, erection and sale of the completed organ in the house of installation.

The record differs in one aspect from that which we considered when it was here before. At final hearing, it was established and found by the court below, that the appellants were engaged in interstate commerce in the sale, shipment and installation of its organs. The court below found that the appellants, with one exception, maintained organ factories outside of the State of New York and entered into contracts for the sale and installation of organs within the State; that the essential parts of the organ are made in the factories, with the exception of the flues leading from the air pipe to the air box of the chambers; some parts are temporarily assembled before shipment and are tested in the factory, but shipment is then made in separate parts and installed on the premises of the purchaser. The district judge said:

> "The agreement of the organ manufacturer to install is not only relevant and appropriate to the

> interstate sale but is essential if an organ, as distinguished from its parts, may be sold at all. The thing sold is a musical instrument, complete in itself. * * * Without descending to mechanical description it may be said that the work of installation is of the most vital importance in the construction of the completed organ, and requires in its performance not only the highest mechanical skill but a thorough understanding of the methods employed by the manufacturer in the arrangement of mechanical and electrical connections. * * * Whatever distinctions may be drawn in doubtful cases, it is clear that the instant case is governed and controlled by the decision in the ice machine case. (York Mfg. Co. *v.* Colley, 247 U. S. 21.) The distinction there drawn betwen the setting up of lightning rods (Browning *v.* Waycross, 233 U. S. 16) and the installation of an ice machine shows that the contracts here in question for the construction and installation of organs clearly involve interstate commerce not only in the manufacture and shipment of the organ, but in its installation after arrival within the State."

With this conclusion we agree.

The only work performed by the purchaser is hoisting the organ parts if unduly bulky, installation of high voltage electrical connections, furnishing and installing the wind trunking between the blower room and the organ chamber, and the furnishing of light, heat and electric power required for the erecting, tuning and completion of the instrument. The other work of installation was performed by the appellants' skilled workers.

Labor troubles developed in the industry because of demands made by Organ Workers Local No. 9, relative to wages and working conditions and the employment of men in New York City. This related to installation work. A general strike was called by that union which lasted for fourteen weeks in 1925. In September, 1927, a delegate of the Organ Workers Local No. 9 presented a form

of union contract for signature to the appellant, Wurlitzer Co., which made provision for the employment of none but union men and women. This contract was not signed by this appellant and some of the men who were members of the union left the union. Organ Workers Union No. 9 became affiliated with the Building Trades Council through the representation of its delegate and the council consisted of various building trade unions of New York City. Its constitution forbids "their members to work with a non-union man, or with members of a dual or hostile body to any industry represented." This co-operation on the part of the unions made it impossible for an employer or contractor engaged in the building trades to do his work with non-union men and the record shows that it is impossible for a building to be erected in this city without the exclusive employment of union labor. It resulted in having the force and effect of the Building Trades Council in back of the efforts of the Organ Workers' Local No. 9, to force unionism upon appellants' non-union organ workers. It may be questioned whether installation of an organ is the work of erecting a building, for when it is installed, the organ is still a musical instrument.

Organ Workers Local No. 9 is also affiliated with the Combined Amusement Crafts, an association of stage hands and theatre operators whose sympathetic support it had threatened to use. In February or March, 1928, Local No. 9 had a membership of about ninety men and its delegate endeavored to get the non-union men to join. His purpose was to unionize fully the outside work of erecting organs in New York and other parts of the country and then to unionize the factories by the requirements that all organs erected in a building where union labor is employed must be manufactured by union men and bear the union label. In order to prevent non-union men working in the buildings where the appellants were installing organs, the delegate of Local No. 9 told purchasers of or-

gans that he would call out all the trades on strike if the particular organ was installed by non-union men. This threat was made to one Hammerstein, a purchaser of an organ for the Hammerstein Temple of Music, and to an owner who purchased an organ for the Plaza Theatre. In the Elks' Club, Brooklyn, one of the appellants' (the Aeolian Company) men were locked out from the building. At the Plaza Theatre in Linden, N. J., workers were secretly substituted for the Wurlitzer men in violation of the terms of the contract of installation and after these men had been discovered and removed, it became necessary for the Wurlitzer Company to work at night in order to avoid interference with the building trades. The Wurlitzer Company men were driven from the work at the Ritz Theatre, Lindenhurst, N. J., and were off the job for a week until the electricians and other building trades had completed their work. Another instance of interference was a delay of from two to four days at the Castle Hill Theatre. Men were assaulted at the Marble Hill Theatre and the entire force had to be removed and stayed away for about six weeks. The Wurlitzer men were arrested for trespassing at the Oxford Theatre, Little Falls, N. J., after the general contractor had been served with a general strike order. The owner of the Pythian Theatre was threatened with a general strike and he paid to have the organ workers reinstated in the union so that they might finish the work unmolested. One contract, between the appellant Estey Organ Company and the Capital Theatre for additions and repairs to an organ, was cancelled after threats to call out the theatrical trade and the work was finished by union men not in the employ of the Estey Organ Co. The Austin Organ Company's workmen were taken off the installation of a theatre at Mount Vernon, N. Y., after threats made by a union delegate and were not permitted to return until after they had been unionized at the company's expense. The Skinner Organ Company was given three days of grace to

unionize its men at the Colony Theatre and they were only allowed to go on with the work after they had joined the Local No. 9 at the expense of that company. Other acts of interference with the appellants' interstate commerce consisted of threats to strike and unjustified claim of right of the sheet metal workers delegate to do the wind trunking within the organ as well as without; also threats were made by the riggers union delegate that the organ would have to be taken out of the building because it was rigged by non-union men. In one instance a switchboard was nailed up and the electric wires cut by an electrician on the Universal Theatre job. The Electricians Union, Local No. 3, refused to do the wiring on the organ installed in the Church of the Redeemer in Brooklyn, and a general strike followed there.

These interferences with the appellants' business have seriously affected their good will, for organ purchasers are fearful of contracting with them, feeling that they would have difficulty in installing their instruments and also with the building trades unions. This interference stands uncontradicted, although the delegate of Union No. 9 was a witness for the defense.

In Anderson *v.* Shipowners (272 U. S. 359), plaintiff sought to enjoin the Ship Owners' Association whose men controlled substantially all the merchant vessels of American registry, who engaged in interstate and foreign commerce, because they had entered into an arrangement to control the employment of all seamen on their vessels by maintaining employment agents in California and where every seaman was compelled to register and await his turn in order to secure employment. No person could secure employment unless he was registered, with the result that some seamen were delayed in securing work. The plaintiff was barred from employment because of failure to comply with these regulations and brought this

suit asking for an injunction and damages. In holding that the combination was illegal, the court said:

> "If the restraint thus imposed had related to the carriage of goods in interstate and foreign commerce—that is to say, if each shipowner had precluded himself from making any contract of transportation directly with the shipper and had put himself under an obligation to refuse to carry for any person without the previous approval of the associations—the unlawful restraint would be clear. But ships and those who operate them are instrumentalities of commerce, and within the Commerce Clause no less than cargoes. * * * It is not important, therefore, to inquire whether, as contended by respondents, the object of the combination was merely to regulate the employment of men, and not to restrain commerce. A restraint of interstate commerce cannot be justified by the fact that the object of the participants in the combination was to benefit themselves in a way which might have been unobjectionable in the absence of such restraint. * * * These shipowners and operators, having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and discretion, it follows, as the case now stands, that the combination is in violation of the Anti-Trust Act."

The undoubted purpose of the appellees was to monopolize the work with which the appellants were concerned, that is, the installation of organs, and require only their membership or union workers for each job. It restricted the liberty of employers and employees to engage in interstate commerce, whenever the employment of non-union members is involved, and is an interference with interstate commerce. It is immaterial whether the combination is unlawful because it interferes with the right of non-union men to engage in such part of interstate commerce or with the right of employers of non-union men to so engage; the result is the same. If the com-

bination is illegal for either reason, the person or corporation injured in its or his property rights is entitled to relief. Chattanooga Foundry & Pipe Works *v.* City of Atlanta, 203 U. S. 390; U. S. *v.* Colgate & Co., 250 U. S. 300; Loewe *v.* Lawler, 208 U. S. 274; U. S. *v.* Patten, 226 U. S. 525. The inquiry is not as the court below conceived it to be, whether or not there was a combination to exclude the appellants' organs from interstate trade or commerce. It is as much a violation of the Sherman Act, as amended by the Clayton Act, for combinations to exclude individuals from work in interstate commerce. Finding that the installation of the organ was work in interstate commerce and that there was a combination directly to restrict and obstruct that work, the opportunities of engaging therein was work of interstate commerce. But the interference with this interstate commerce was not confined to preventing workmen from engaging in the employment of the appellants as non-union men. There was a combination to obstruct and interfere with the appellants in carrying out their interstate trade and commerce in their usual and practical way which, of itself, was a violation of the act. It is not material or important whether the restraint operates upon this interstate commerce at the point of origin or at the point where it comes to rest. Bedford Stone Co. *v.* Journeymen's Stone Co., 274 U. S. 37; Binderup *v.* Pathe Exchange Inc., 263 U. S. 291; Ramsay Co. *v.* Associated Bill Posters, 260 U. S. 501; Duplex Printing Press Co. *v.* Deering, 254 U. S. 443. The combination formulated by the appellees to curtail the liberty of the appellants and their employees to engage in the phase of the interstate commerce involving installation, was a violation of the anti-trust laws and their refusals to permit non-union men to work and striking to interfere with the work of the appellants in installing organs, was a violation of the anti-trust acts. Duplex Printing Press Co. *v.* Deering,

supra; Bedford Stone Co. *v.* Journeymen's Stone Co., *supra.*

The organs involved were not part of the building construction and there is no evidence of any community of interest between the erectors of these organs and the numerous and various trades engaged in erecting a building. There was no evidence of close contact between these groups but the evidence is ample and undisputed that the purpose of the appellees was to secure for the organ workers' union a complete monopoly of the work of installing organs in New York and Northern New Jersey and to bring about a condition which would impose upon the craftsmen in the trade, for refusing to join their union, an impossibility of employment in their trade and thereby gaining a livelihood.

The appellee, Meller, made clear upon his examination that he was a member of the Building Trades Council and I "have something behind me." This he described as full sympathetic support and, as he said: "no organ will be erected in New York City unless they erect it by union labor, as the building trades will not work with any non-union workers." The courts have condemned such interference. Hitchman Coal Co. *v.* Mitchell, 245 U. S. 249; Bitterman *v.* Louisville & Nashville R. R. Co., 207 U. S. 205; Central Metal Products *v.* O'Brien, 278 Fed. 827; Hodge *v.* Meyer, 252 Fed. 479; Amer. Malting Co. *v.* Keitle, 209 Fed. 351; Irving *v.* District Council, 180 Fed. 896; Lehigh Structural Steel Co. *v.* Atlantic Smelting & Refining Works, 92 N. J. Equity 131; McCord *v.* Thompson-Starrett Co., 129 App. Div. 130.

In thus preventing the appellants and their employees from carrying on their business because the workmen do not belong to the union, there was formed a combination having for its primary purpose the obstruction of the appellants in carrying on their interstate business. The injury to them is not merely incidental; the direct

and immediate purpose is to oust the appellants and their employees from the conduct of their business in New York and its vicinity unless they submit. The means adopted to declare a labor boycott of all the trades on the buildings, within the affected area where the appellants carry on their business, and by their control of the building business, make it impossible for the owners, contractors or architects to do business in this area with the appellants. Such combination is a secondary boycott. Duplex Printing Press Co. *v.* Deering, *supra;* Central Metal Products *v.* O'Brien, 5 Fed. (2d) 389. In such a combination against an employer there is every suggestion of coercion, attempted monopoly and deprivation of livelihood and remoteness of the legal purpose of the union to better its members' condition. American Steel Foundries *v.* Tri-City Council, 257 U. S. 184; Hitchman Coal & Coke Co. *v.* John Mitchell, 245 U. S. 229; Iron Molders' Union *v.* Allis-Chalmers Co., 166 Fed. 45.

The record before us justified a decree in favor of the appellants for an injunction.

Decree reversed.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

THE AEOLIAN COMPANY, *et al.*,
Plaintiffs-Appellants,

—against—

JACOB FISCHER, individually, and as President of PIANO, ORGAN and MUSICAL INSTRUMENTS WORKERS' INTERNATIONAL UNION OF AMERICA, *et al.*,
Defendants-Appellees.

AUGUSTUS N. HAND, Circuit Judge: (concurring)

I concur with the majority because of the controlling decisions of the Supreme Court in Duplex Printing Press Co. *v.* Deering, 254 U. S. 443 and Bedford Stone Co. *v.* Stone Cutters' Association, 274 U. S. 34.

The District Judge relied on United Mine Workers *v.* Coronado, 259 U. S. 344; United Leather Workers *v.* Herkert & Meisel, 265 U. S. 457 and Industrial Association *v.* United States, 268 U. S. 64. But these decisions do not, in my opinion, support the conclusion reached. Mining is not Interstate Commerce; United Mine Workers *v.* Coronado, *supra.* Manufacturing is not Interstate Commerce; United Leather Workers *v.* Herkert & Meisel, *supra.* Building is not Interstate Commerce; Industrial Association *v.* United States, *supra.* In all of these cases the interference was at a point where Interstate Commerce was not in operation, but not as here at a point where in contemplation of law it continued to exist.

The fact that the installation of the organs was Interstate Commerce required that such installation (in the same way as transportation) should be free from unlaw-

ful interference. Because of the decisions in Duplex *v.* Deering and Bedford Co. *v.* Stone Cutters' Association, *supra*, we must hold that the interference here was unlawful and was a violation of the Sherman Anti-Trust Law.

No. 477

NOV 26
CHARLES ELMO

IN THE

Supreme Court of the United States.

BARKER PAINTING COMPANY,

Petitioner,

—against—

LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA; BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA; GEORGE W. HOFFMAN and HARRY S. WARREN,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MORRIS HILLQUIT,
Attorney for Respondents,
No. 19 West 44th Street,
New York City.

THE COURT PRESS—Law Printers—47 West Street—Bowling Green 2820-1-4

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Respondents.

Answer to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The answer of Local No. 734, Brotherhood of Painters, Decorators and Paperhangers of America; Brotherhood of Painters, Decorators and Paperhangers of America; George W. Hoffman and Harry S. Warren, respondents in the above case,

RESPECTFULLY REPRESENTS:

1. The respondents deny that the bill in equity set forth in paragraph "1" of the petition was filed to enjoin

the enforcement of the rule of the Brotherhood of Painters, Decorators and Paperhangers of America which requires an employer, performing work other than in his home city, to pay the wage scale, either of his home city or of the place where the work is being performed, whichever be the higher.

They likewise deny the allegation contained in paragraph "1" of the petition to the effect that the proof on final hearing on the said bill showed that the petitioner complied with all Union conditions as to hours, wages, etc., for the territory including Somerville, New Jersey; that all workers employed by the petitioner were satisfied with the wages paid by the petitioner; that the defendant George W. Hoffman made any threats to the petitioner; that the petitioner's employees ceased working only because they feared that they would be expelled from the Union if they continued at work; that the painting industry in Somerville, New Jersey was in effect 100% organized, and that all other branches of the building industry in New York, Northern New Jersey, Connecticut and Pennsylvania were so organized and that no painting work could be done or performed except with union labor, and that the Brotherhood of Painters, Decorators and Paperhangers of America threatened to compel petitioner and all other painting contractors to comply with the rule of the Brotherhood above mentioned by strikes and boycotts.

2. The respondents deny the allegations of paragraph "2" of the petition herein to the effect that the bill herein was filed to enjoin the enforcement of the rule of the Brotherhood above mentioned; that the alleged interference with the performance of the particular contract mentioned in the bill was set forth merely as

an overt act and that there was any actual interference with the performance of the petitioner's contract by the respondents.

3. They admit the paragraphs of the petition herein numbered "3", "4", "5", "6", "11" and "13".

4. They deny the allegations contained in paragraphs "7" and "10" of the petition.

5. They deny the allegations in paragraph "8" of the petition to the effect that the Circuit Court of Appeals, in declining to review the decree dismissing the bill upon its merits, decided an important question of general law in an untenable way and in conflict with the weight of authority; that the matter decided by the District Court is of much general importance and of far-reaching effect; that the District Court adopted a construction by the Court of Errors and Appeals of New Jersey of a statute of New Jersey, which thus construed is offensive to the Fourteenth Amendment of the Constitution.

6. They deny that the refusal of the Circuit Court of Appeals to decide the instant case on its merits had the effect of giving to its prior decision the quality of *res adjudicata,* as alleged in paragraph "9" of the petition.

7. They deny the allegations in paragraph "14" of the petition to the effect that the Court of Errors and Appeals of the State of New Jersey in the case of *New Jersey Painting Co.* v. *Local No. 26,* 96 N. J. E. 632, in construing a statute of the State of New Jersey, overruled its previous decision involving the construction

of the said statute and that the said statute so construed by the New Jersey Court of Errors and Appeals is violative of Article 1, par. 1 of the New Jersey Constitution and with the provisions of the Fourteenth Amendment to the Constitution of the United States.

8. The respondents respectfully show and represent that the question raised by the instant petition for a Writ of Certiorari has been submitted to this Court on two previous occasions and that on both occasions such petitions have been denied (*Barker Painting Company* v. *Brotherhood of Painters, Decorators and Paperhangers of America et al.*, 273 U. S. 747; *Barker Painting Company* v. *Brotherhood of Painters, Decorators and Paperhangers of America*, 276 U. S. 631).

In the case first above mentioned (273 U. S. 747), the petition was from a decision of the Circuit Court of Appeals in the same Third Circuit in an action between practically the same parties and involving precisely the same question, *i. e.*, the validity of the rule of the Brotherhood of Painters, Decorators and Paperhangers of America attacked herein.

The issue was raised on an application for a preliminary injunction, but the question was argued and decided on the merits.

Counsel for the respondents has examined the papers on the said petition for a Writ of Certiorari and hereby quotes the following allegations of the said petition in support of the above averment.

> "There was no dispute as to the essential facts on which plaintiff based its case.
>
> The Brotherhood of Painters is a Labor Union of nationwide scope, with District and Local

branches throughout the United States. It has fixed various scales of wages and working conditions applicable to the various localities within its jurisdiction, that for Philadelphia being $8 per day for a 5½-day week, that for New York being $10.50 per day for a five-day week, the wages fixed for the other localities varying from the $10.50 per day in New York down to $6 in Waynesburg, Pa. Defendant has a union rule that whenever the wage scale fixed for the locality where the work is done is lower than that fixed for the place where the employer's principal office is located, the employer, even though he employ none but local men, must in every case pay the higher scale, and must also observe any more favorable working conditions applicable to the employer's home city."

* * * * * * * *

"While the case at bar involved an application for preliminary injunction, the case was argued and decided on the merits. The only question involved in the case is the legality of defendants' union rule. This question was squarely raised and decided in the proceedings here sought to be reviewed, and could be no more directly presented to this Court by any additional proceedings."

The said petition, which was denied by this Court, therefore clearly involved the identical questions sought to be reviewed in the present proceeding.

Barker Painting Company v. *Brotherhood of Painters, Decorators and Paperhangers of America,* 276 U. S. 631, was a petition for a Writ of Certiorari directed to the Court of Appeals for the District of Columbia.

Counsel for respondents has had no opportunity to

examine the said petition, but is fully familiar with the action, which was instituted in the Supreme Court of the District of Columbia and the respondents hereby aver that the said action was likewise brought to enjoin the defendants from the enforcement of the rule under consideration upon the alleged ground that the same was contrary to public policy and illegal.

The bill of complaint in the said action was dismissed on the merits by the Supreme Court of the District of Columbia, whose judgment was affirmed on appeal by the Court of Appeals of the said District.

WHEREFORE, respondents respectfully pray that the petition be dismissed.

LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA:

BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA:

GEORGE W. HOFFMAN and
HARRY S. WARREN.

MORRIS HILLQUIT,
Attorney for Respondents.

BRIEF IN SUPPORT OF ANSWER.

Statement of the Case.

(The references are to pages in the Transcript of the Record in the Circuit Court of Appeals.)

The facts in the case are substantially as follows:

The defendant, Brotherhood of Painters, Decorators and Paperhangers of America, hereinafter designated as the Brotherhood, is a national labor union composed of workers in the various branches of the painting and paperhanging industry, about one hundred thousand (100,000) in number, who are represented by approximately one thousand two hundred and fifty (1,250) local unions in all parts of the United States and Canada (p. 101).

Local No. 734 is one of such local unions of the Brotherhood and represents the organized painters of Somerville, in the State of New Jersey.

The defendant George W. Hoffman is the business agent of a labor organization which includes Local No. 734, and the defendant Harry S. Warren is an organizer of the Brotherhood.

The Brotherhood as such does not fix the wage scales of its members nor does it enter into agreements with employers or associations of employers. These functions are left to the local unions (p. 107). The functions of the Brotherhood are confined to matters of general and common interest to all members of the organization. For

that purpose, the Brotherhood has adopted a constitution consisting of rules of a general character applicable to all its members and subordinate organizations. In the convention of the Brotherhood held at Dallas, Texas, in the month of September, 1921, certain amendments to the constitution were proposed and subsequently ratified by the membership, which amendments were thereafter incorporated in the constitution as Sections 132 and 133, and read as follows:

> "Sec. 132. Neither the General Executive Board nor any other authority shall have power to grant exclusive or special privileges to any local union or district council working under a charter of this Brotherhood; nor shall the G. E. B. or any other authority be invested with power to force any employer to bring men from one city to work in another city if union men can be procured in such city where the work is to be erected and finished. All conditions of such localities shall be strictly adhered to, the shorter work day and the higher scale of either locality to prevail in all cases. A card fully paid up, regardless of where it is issued, shall entitle the holder to the right to work in any city provided he conforms with the working rules and conditions of the locality and that no strike or lockout exists in that locality.
>
> When a contractor, builder or boss painter does any work pertaining to our trade outside his home city or town—and in a locality where a District Council or a Local Union exists—not less than fifty (50) per cent. of the men in such district shall be employed on all work coming within the jurisdiction of the Brotherhood of Painters, Decorators and Paperhangers of America as defined in the General Constitution.

Sec. 133. A member leaving the jurisdiction of the local union in which he is a member to work for his employer on a job in the jurisdiction of another local union must comply with the working rules and laws of that locality and demand in all cases the shorter work day and the higher scale." (Plaintiff's Exhibit 2, pp. 147, 148).

The Barker Painting Company is a New York corporation with headquarters in New York City.

On or about the 8th day of November, 1924, it entered into a contract to do the painting work of a building in process of construction in Somerville, New Jersey, known as the Somerset Hospital (Bill, par. 8).

At the time the controversy between the parties hereto arose, the prevailing scale of painters' wages in Somerville, New Jersey, was Eight ($8) Dollars per day. The prevailing wage scale in the City of New York was Ten and 50/100 ($10.50) Dollars per day.

At the time it took the contract for the Somerset Hospital the plaintiff was fully aware of the provisions of the Constitution of the Brotherhood above quoted and knew that the Court of Errors and Appeals of New Jersey had upheld their validity in May, 1924, *i. e.,* six months before it undertook the Somerville work. On two previous jobs which the plaintiff did in Kearny and Newark, New Jersey, it had paid the New York rate of wages which was higher than the local rate (pp. 45, 46).

On the Somerville job the plaintiff paid its painters the local rate of Eight ($8) Dollars per day and proceeded on that basis until about 30% of the work was done.

At that point the infraction of the Brotherhood rule called to the attention of the defendant Hoffman, business agent of Local No. 734, by the Brotherhood organizer Warren. Hoffman in turn brought the situation to the attention of the plaintiff and demanded the New York rate of wages for the painters employed on the Somerville job.

Upon the plaintiff's refusal to accede to the request, Hoffman informed the Brotherhood members of the plaintiff's position and reminded them that under the provisions of the Brotherhood Constitution it was their duty to demand the New York rate of wages, *i. e.*, Ten and 50/100 ($10.50) Dollars a day.

Such employees thereupon quit work on the plaintiff's Somerville job (pp. 49, 51, 53, 56, 57).

There was no formal declaration of a strike, no picketing and no acts of violence or disorder.

Upon this state of facts the plaintiff obtained a preliminary injunction in substance restraining the defendants from ordering, encouraging or aiding any strike or cessation of work against the plaintiff.

The injunction was mandatory in character restraining the workmen from not returning to work. Upon its issuance the work was resumed and fully completed on the basis of the local wage scale of $8 a day.

Upon the trial the injunction was dissolved and the plaintiff's bill dismissed on the merits.

Thereafter the plaintiff appealed from the judgment and decree of the District Court to the Circuit Court of Appeals for the Third Circuit, which court affirmed the decree of the District Court for the reasons stated in the opinion of said Court (attached to the record herein), refusing to go into the merits of the case.

It is this decision of the Circuit Court of Appeals that is sought to be reviewed by certiorari.

POINT I.

The bill was properly dismissed in the District Court because the plaintiff did not sustain irreparable injury and because it had an adequate remedy at law.

From the undisputed facts in the case it appears that the plaintiff was in no way damaged by the refusal of its workers to continue working at the wage rate of $8 per day. That refusal was followed immediately by an injunction, in effect directing the workers to return to work at the $8 rate, which injunction was fully complied with.

The work was thus completed at the wage rate contended for by the plaintiff, and the only damage which plaintiff could have sustained was that arising from the short delay between the workers' refusal to continue at the local wage rate and the issuance of the injunction.

Such damage is readily ascertainable and computable and could be recovered from the defendants in an action at law.

POINT II.

The District Court had no jurisdiction of the case either on the basis of diversity of citizenship or on constitutional grounds.

If the plaintiff relies on diversity of citizenship it was incumbent upon it to prove the allegations of

paragraph "13" of its bill to the effect that "the matter of controversy exceeds, exclusive of interest and costs, the sum or value of Three thousand ($3,000) Dollars."

This the plaintiff has not proved.

The sum to be paid to the plaintiff for the painting of the Somerset Hospital was Seventy-eight hundred ($7800) Dollars (p. 143). If the entire amount represented nothing but the cost of labor to be paid by the plaintiff to his workers the difference between $8 per day and $10.50 per day would amount to considerably less than Three thousand ($3,000) Dollars. But as above stated the plaintiff, as a matter of fact, completed the whole work at $8 per day and thus sustained no damage whatsoever.

The constitutional ground relied on by the plaintiff is that the rule of the Union is offensive to the provisions of the Fourteenth Amendment of the Constitution of the United States.

This contention is entirely untenable on the face thereof. The Fourteenth Amendment has reference solely to actions of the State and not to any actions of private individuals.

Civil Rights Cas., 109 U. S. 3;
Virginia v. *Rives*, 100 U. S. 313, 318;
U. S. v. *Cruikshank et al.*, 92 U. S. 542, 554.

And even if the rule of the Brotherhood under attack be given the same effect as a statute passed by a State legislature, it does not offend the Fourteenth Amendment because it operates alike on all persons similarly situated.

Griffith v. *Connecticut*, 218 U. S. 563;
Walston v. *Nevin*, 128 U. S. 578;
Williams v. *Bruffy*, 96 U. S. 176.

POINT III.

The Circuit Court of Appeals properly refused to re-open the question.

In November, 1925, the Barker Painting Company, the petitioner herein, instituted an equity suit in the District Court of the United States for the Eastern District of Pennsylvania against the Brotherhood of Painters, Decorators and Paperhangers of America, one of the respondents herein, to procure an injunction restraining the said Brotherhood from enforcing Sections 132 and 133 of its Constitution. On a motion for preliminary injunction the District Court, after a full oral hearing, denied the motion on the merits, holding that the said provisions of the Brotherhood Constitution were not unlawful. Thereafter the plaintiff appealed to the Circuit Court of Appeals for the Third Circuit, which affirmed the order of the Court below in an elaborate opinion (15 Fed. (2nd) 16).

The appeal to the Circuit Court of Appeals in the instant case involved precisely the same question as was involved in the earlier case, although in one case the appeal was from the final judgment, while the other involved an application for preliminary injunction.

On this point counsel again respectfully directs the attention of the Court to the statement contained in the petition for a Writ of Certiorari in the case first passed upon by the Circuit Court of the Third Circuit and which reads as follows:

> "While the case at bar involved an application for preliminary injunction, the case was argued and decided on the merits. The only question

involved in the case is the legality of defendants' union rule. This question was squarely raised and decided in the proceedings here sought to be reviewed, and could be no more directly presented to this Court by any additional proceedings."

POINT IV.

The Circuit Court of Appeals properly dismissed the bill because it presented a moot question.

The action herein was not instituted to restrain the defendant Brotherhood from enforcing the rule under discussion everywhere and under all circumstances. It is very doubtful whether a bill of such nature could be framed and maintained.

The bill sought to restrain the defendants from interfering with the plaintiff's work at a particular time and place, *i. e.*, its work on the Somerset Hospital, which was being done in the month of March, 1925. The work on that particular building is set forth as the basis of the bill in paragraph 9 thereof, and while the relief prayed for includes an adjudication that the Union rule in question is illegal and void, it is primarily addressed to a demand that the defendants be enjoined and restrained from ordering or continuing a strike against the particular premises, and since the building was fully completed before the case reached the Circuit Court of Appeals there was no real controversy before that Court.

The Circuit Court of Appeals disposes of the question in the following language:

> "Thus it is clear the questions which the plaintiff has raised are moot because, having been

saved from injury throughout the work by the preliminary injunction, it has sustained no damage by the defendants' abortive enforcement of its rules. While as a matter of fact, or, perhaps, a matter to be inferred from the averments of the bill or from their past practices, the defendants propose to continue to enforce their rules, it does not follow necessarily that they will enforce them against the plaintiff or that the plaintiff will continue in business, or that, continuing in business, it will suffer by the rules' enforcement."

The authorities cited by the petitioner in its brief herein (*Bedford Cut Stone* v. *Journeymen S. C. Asso.*, 274 U. S. 37; *Thompson Machine Co.* v. *Brown*, 89 N. J. E. 326, and *Vicksburg Water Works* v. *Vicksburg*, 185 U. S. 66) have no bearing on the point under discussion.

All that these cases hold is that a court of equity will not wait for the damage actually to have been sustained but will restrain an unlawful act upon a threat to cause damage.

None of these authorities go to the extent of holding that if a concrete controversy is settled, a court of equity will issue an injunction on the ground that another and similar controversy between the parties may arise on some other and future occasion.

POINT V.

The acts of the defendant in attempting to enforce the Brotherhood Rule do not constitute a boycott.

The essential features of a boycott involve the following elements:

(1) An organized combination

(2) directed against specific persons or corporations

(3) with intent to do them injury or harm

(4) by inducing others to withdraw business intercourse

(5) through threats, violence or other coercive measures.

Bouvier's Law Dictionary—"Boycott", 16 R. C. L., p. 477;
Black—Law Dictionary—"Boycott";
Words and Phrases —"Boycott".

None of these elements is present in the case at bar. The defendants did not attempt to induce anybody to withdraw business patronage or intercourse from the plaintiff. All they said was that their particular members would not work for the plaintiff for less than a stipulated wage rate. Their object is not to hurt the plaintiff but to benefit themselves. They did not resort to violence or intimidation and did not seek to coerce third parties to sever business relations with the plaintiff. They were purely passive in their refusal to accept plaintiff's terms of payment for their labor.

At most, the conduct of the defendants may be characterized as a strike for the enforcement of a union rule voluntarily adopted, and such a strike is entirely lawful.

POINT VI.

The Brotherhood Rule does not constitute a combination in restraint of trade in violation of the Sherman and Clayton Acts.

As was said by Mr. Justice Smith of the Supreme Court of the District of Columbia in the similar case of *Barker Painting Company* v. *Brotherhood of Painters, Decorators and Paperhangers of America,* in an unreported opinion:

> "The terms trade and commerce as used in the Sherman Act mean interstate traffic, the interstate purchase, sale, or exchange, of commodities, the interstate transportation of persons and property, and possibly the interstate transmission of messages. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 203. Section 6 of the Clayton Act expressly provides that the labor of a human being is not a commodity or an article of commerce and that labor organizations shall not be construed to be illegal combinations or conspiracies in restraint of trade under anti-trust laws. Reading the Sherman Act and the Clayton Act together, it is apparent that the Brotherhood of Painters, Local Union No. 368, and the members thereof, cannot be regarded as a combination or conspiracy in restraint of trade or commerce."

And again:

> "But, however that may be, Section 6 of the Clayton Act specifically excludes the labor of human beings from the category of commodities or articles of commerce, and from that it necessarily results that defendants' collective rejection of employment for non-acceptance of the Brotherhood's 'higher wage' and 'shorter work' rules was not an interference with the purchase, sale, exchange, or transportation of commodities, and consequently was not a restraint of trade or commerce."

And again:

> "The plaintiff was not restrained by the defendants from the buying, selling, exchanging, or transportation of goods, wares or merchandise, and no such restraint could be exercised inasmuch as plaintiff's business was not of that kind. The business of the Barker Painting and Decorating Company is painting and decorating not merchandising or the transportation of persons or property, and therefore its business is not trade or commerce within the meaning of the Sherman Act. The plaintiff contracts to paint and decorate and its contracts are governed by the law of the place in which they are made or in which they are to be performed. Such contracts are not commodities and 'are not interstate transactions though the parties may be domiciled in different states'. *Paul* v. *Virginia*, 8 Wall. 168, at page 183."

POINT VII.

The rule of the Brotherhood is not unreasonable.

A union of workers is not called upon to justify a strike of its members. If such strike is claimed to be unlawful because called for an unlawful object or conducted by unlawful means, the burden of proving such unlawfulness rests upon the party asserting the same.

But even on the theory that the union is charged with the duty of justifying the strike, the defendants have fully met the test in this case.

The strike alleged to be called or threatened by them was for the purpose of enforcing the provisions in their constitution set forth in Sections 132 and 133.

The motive and object of the Brotherhood of Painters, Decorators and Paperhangers of America in adopting the said rule are explained by the witness Joseph F. Kelley, Vice-President of the Brotherhood substantially as follows: The employing painters in the United States may be divided into two classes with respect to the scope and character of their work, to wit, local concerns, who confine their work to their own localities, and national concerns, who are called upon to do work in all parts of the country. The home offices of the latter center principally in the largest cities such as New York, Chicago and Boston. The work done by such "national" painting contractors is distinguished from that ordinarily done by local concerns qualitatively or quantitatively, *i. e.*, it is either decorative work on especially fine buildings, such as public buildings, churches, theatres, banks or

expensive private residences or work of a commercial character involving large operations, such as loft or office buildings, manufacturing plants or wholesale housing developments.

Since both of such classes of work are apt to be in great demand in the large cities and industrial centers, such places attract and develop journeymen painters of skill and efficiency above the average and their rate of wages are fixed accordingly.

In smaller towns and localities, the ordinary painting work is as a rule done by local contractors, employing local workers, but when such a town requires painting work on an especially fine building or on an operation of unusual size, the work is frequently given to "national" painting contractors, *i. e.*, large concerns with a national reputation whose home office is in New York, Chicago or other large city. The "national" contractor in such case bases his charges on the labor cost at his home town, unless the local wage rate is higher, which is very rarely the case (pp. 101-110).

Since the special character of the work, which the national contractor is called on to do in small towns, often requires a higher degree of skill or experience than that possessed by the local journeymen painters, the contractor as a rule sends a number of his employees into such town to do all or part of the work.

This custom has given rise to a complexity of problems within the industry. Local artisans complained of being displaced by painters coming from New York or other large centers to do jobs in their localities, and in order to do justice to such local workers while taking account of the special needs of the builder, the rule was established to the effect that at least one-half of the

painters employed on a local job shall be workers of the locality.

Another serious problem arising from the situation concerned the terms of employment, *i. e.*, wages and hours of labor on such jobs. If we assume that a painting job is being done on a building in the State of New Jersey by an employing painter of the City of New York, and that twenty men are employed on the job, one-half of them coming from New York where the prevailing rate of wages is $10.50 per day, and the other half coming from the particular locality in New Jersey, where the prevailing wage is $8.00 per day, and the men are doing the same work, the question arises what scale is to be applied to the job. Three possibilities presented themselves to the convention of the Brotherhood in its attempt to solve the problem:

1. The payment of different wage rates to the workers engaged in the same work on the same job. This was rejected as an unjustifiable discrimination and as a practice apt to create jealousies and antagonisms among the workers and to impair the efficiency of their work as well as the integrity and morale of the organization.

2. To apply the lower wage rate, prevailing in the locality, to all workers on the job. This, too, was rejected for the reason that it would be manifestly unfair to require, say a worker coming from New York and compelled to live away from home, to work for a smaller wage than he would receive if he had remained working at home.

3. To apply the higher scale to all workers engaged on the job. This was adopted as the most equitable solution, and one most nearly just to both classes of workers, as well as to the employer. A contracting firm of New York or other large center in undertaking a country job always figures upon the wages and cost of production prevailing in his home territory, and a country builder engaging a New York painting contractor, figures on New York costs and is prepared to pay somewhat more than he would have to pay to a local contractor.

Whether the rule thus adopted by the Brotherhood is wise and whether it represents the best possible solution of the problem of migratory labor in the painting industry is a question upon which opinion may be divided, but it is not questioned and cannot be questioned that the rule was adopted by the members of the Brotherhood in good faith and in the belief that its enforcement would prevent unfair discrimination and destructive jealousies and rivalries among its members and result in the preservation of their standard of life without doing an injustice to the employers.

Thus viewed, it is a condition which the organized painters of this country attach to their labor in the same way as the wage scale, work hours and other conditions upon which they are willing to perform work for employers.

The rule thus established by the Brotherhood has the triple aspect of a wage regulation, an effort to secure equitable distribution of work among its members and of a measure to preserve the integrity of the organization and harmony among its members, and it is re-

spectfully submitted that all of these are legitimate objects of trade union activity.

POINT VIII.

The Construction of the New Jersey Statute by the Court of Errors and Appeals of that State does not render the said Statute offensive to the provisions of the Fourteenth Amendment.

That statute (3 Comp. Stat. of N. J., p. 3051) reads as follows:

> "that it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons or corporation."

In *Jonas Glass Co. v. Glass Bottle Blowers Asso.*, 77 N. J. E. 219, the Chancellor held that the statute above quoted should be treated "as merely rendering the combination no longer indictable".

In *New Jersey Painting Co.* v. *Local No. 26,* 96 N. J. E. 632, the Court of Errors and Appeals held that the expression of the Chancellor above quoted in the *Jonas Glass Co.* case was not necessary to the decision of the case and was *obiter dictum.* The highest Court of the State of New Jersey thus held that the said statute permits the combination therein described for all purposes.

The statute is in effect a re-statement of the generally accepted law on this subject, and there is nothing in it to offend the provisions of the Fourteenth Amendment.

CONCLUSION.

It is respectfuly submitted that the petition for certiorari herein be dismissed.

All of which is respectfully submitted.

Dated, November 22, 1929.

MORRIS HILLQUIT,
Attorney for Respondents.

FILE COPY

APR 22 19
CHARLES ELMORE

No. 477

Supreme Court of the United States.

ON CERTIORARI.

No. 445—October Term, 1929.

BARKER PAINTING COMPANY,

Petitioner,

—against—

LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA; BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA; GEORGE W. HOFFMAN and HARRY S. WARREN,

Respondents.

BRIEF OF RESPONDENTS.

MORRIS HILLQUIT,
Solicitor for Respondents.

THE COURT PRESS—Law Printers—47 West Street—Bowling Green 2820-1-4

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Supreme Court of the United States.

ON CERTIORARI.

No. 447—October Term, 1929.

BARKER PAINTING COMPANY,

Petitioner,

—against—

LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA; BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER HANGERS OF AMERICA; GEORGE W. HOFFMAN and HARRY S. WARREN,

Respondents.

BRIEF OF RESPONDENTS.

(Italics are mine except where otherwise noted. The references to pages relate to the printed transcript of the record.)

Statement.

This case comes before the Court on certiorari granted December 9, 1929, to review a decree of the United States Circuit Court of Appeals for the Third Circuit, affirming a decree of the United States District Court for the District of New Jersey.

The Facts.

The facts in the case are substantially as follows:

The respondent, Brotherhood of Painters, Decorators and Paper Hangers of America, hereinafter designated as the Brotherhood, is a national labor union composed of workers in the various branches of the painting and paper hanging industry, about one hundred thousand (100,000) in number, divided into approximately one thousand two hundred and fifty (1,250) local unions in all parts of the United States and Canada (p. 101).

Local No. 734 is one of such local unions of the Brotherhood and represents the organized painters of Somerville, in the State of New Jersey.

The respondent George W. Hoffman is the business agent of a labor organization which includes Local No. 734, and the respondent Harry S. Warren is an organizer of the Brotherhood.

The Brotherhood as such does not fix the wage scales of its members nor does it enter into agreements with employers or associations of employers. These functions are left exclusively to the local unions (p. 107). The functions of the Brotherhood are confined to matters of general and common interest to all members of the organization. For that purpose, the Brotherhood has adopted a constitution consisting of rules of a general character applicable to all its members and subordinate organizations. All proposed amendments to the constitution must be submitted to the whole body of the membership and be ratified by a vote of the majority of such members before acquiring validity.

In the convention of the Brotherhood held at Dallas, Texas, in the month of September, 1921, certain amend-

ments to the constitution were proposed and subsequently ratified by the membership, which amendments were thereafter incorporated in the constitution as Sections 132 and 133, and read as follows:

"Sec. 132. Neither the General Executive Board nor any other authority shall have power to grant exclusive or special privileges to any local union or district council working under a charter of this Brotherhood; nor shall the G. E. B. or any other authority be invested with power to force any employer to bring men from one city to work in another city if union men can be procured in such city where the work is to be erected and finished. All conditions of such localities shall be strictly adhered to, the shorter work day and the higher scale of either locality to prevail in all cases. A card fully paid up, regardless of where it is issued, shall entitle the holder to the right to work in any city provided he conforms with the working rules and conditions of the locality and that no strike or lockout exists in that locality.

"When a contractor, builder or boss painter does any work pertaining to our trade outside his home city or town—and in a locality where a District Council or a Local Union exists—not less than fifty (50) per cent. of the men in such district shall be employed on all work coming within the jurisdiction of the Brotherhood of Painters, Decorators and Paperhangers of America as defined in the General Constitution.

"Sec. 133. A member leaving the jurisdiction of the local union in which he is a member to work for his employer on a job in the jurisdiction of another local union must comply with the work-

ing rules and laws of that locality and demand in all cases the shorter work day and the higher scale" (Plaintiff's Exhibit 2, pp. 147, 148).

The petitioner in its brief herein does not quote the foregoing provisions of the Brotherhood Constitution but relies instead on an alleged rule of the Brotherhood worded as follows:

> "Where there is a difference between the wage scale of two cities all members employed upon a job done in one of the two cities by an employer from the other (whether sent from the city in which the employer's place of business is situated or hired in the city where the work is done) shall receive the higher of the two wage scales."

The petitioner is in error when it asserts that the rule in the language quoted by it represents the amendment adopted at the convention of the Brotherhood in 1921.

There is nothing in the record to show that the amendment adopted by the said convention was formulated in the language used by the petitioner in its brief. On the contrary, it appears clearly that the rule as definitely phrased and adopted at the Dallas Convention of the Brotherhood in 1921, was expressed in Sections 132 and 133 of the Brotherhood Constitution above quoted (Plaintiff's Exhibit No. 2, pp. 147, 148).

The petitioner's reference to the pleadings do not justify the formulation of the rule in the language used by it, since such pleadings do not purport to contain a verbatim quotation of the rule but merely a statement of its substance and effect.

The language quoted by the petitioner was in all

likelihood taken from an earlier constitution of the Brotherhood, which was revised and amplified to read as above set forth in Sections 132 and 133, and such formulation of the rule was in force and effect at the time the controversy between the parties hereto arose.

The difference between the two versions is not very material in substance, but the respondents believe it proper that the Court have before it the exact language of the Brotherhood Constitution around which the whole issue in the case revolves.

The Barker Painting Company (complainant below and petitioner here) is a New York corporation with headquarters in New York City.

On or about the 8th day of November, 1924, it entered into a contract to do the painting work of a building in process of construction in Somerville, New Jersey, known as the Somerset Hospital (Bill, par. 8).

At the time the controversy between the parties hereto arose, the prevailing scale of painters' wages in Somerville, New Jersey, was Eight ($8) Dollars per day. The prevailing wage scale in the City of New York was Ten and 50/100 ($10.50) Dollars per day.

At the time it took the contract for the Somerset Hospital the petitioner was operating under a collective agreement between the Master Painters' Association of New York, of which it was a member, and District Council No. 9, the New York organization of the Brotherhood. By the terms of this agreement the petitioner undertook to employ union labor on all its work.

It was fully aware of the provisions of the Constitution of the Brotherhood above quoted and knew that the Court of Errors and Appeals of New Jersey had upheld their validity in May, 1924, *i. e.*, six months before it

undertook the Somerville work. On two previous jobs which the petitioner did in Kearny and Newark, New Jersey, it had paid the New York rate of wages, which was higher than the local rate (pp. 45, 46).

On the Somerville job the petitioner paid its painters the local rate of Eight ($8) Dollars per day and proceeded on that basis until about 30% of the work was done.

At that point the infraction of the Brotherhood rule was called to the attention of the respondent Hoffman, business agent of Local No. 734, by the Brotherhood organizer Warren. Hoffman in turn brought the situation to the attention of the petitioner and demanded the New York rate of wages for the painters employed on the Somerville job.

Upon the petitioner's refusal to accede to the request, Hoffman informed the Brotherhood members of the petitioner's position and reminded them that under the provisions of the Brotherhood Constitution, it was their duty to demand the New York rate of wages, *i. e.,* Ten and 50/100 ($10.50) Dollars a day.

Such employees thereupon quit work on the petitioner's Somerville job (pp. 49, 51, 53, 56, 57).

There was no formal declaration of a strike, no picketing and no acts of violence or disorder.

Upon this state of facts the petitioner obtained a preliminary injunction in substance restraining the respondents from ordering, encouraging or aiding any strike or cessation of work against the petitioner.

Upon the issuance of the preliminary injunction the petitioner's employees returned to work at the local wages of $8 a day and fully completed the same before the trial of the cause and the entry of the decree dismissing the bill.

The petitioner appealed from the said decree dismissing its bill to the United States Circuit Court of Appeals for the Third Circuit. That Court, at an earlier date, had fully passed upon the precise question involved in this appeal, *i. e.*, the validity and legality of Sections 132 and 133 of the Brotherhood Constitution, in an action between this very petitioner and another branch of the Brotherhood.

Barker Painting Company v. *The Brotherhood, etc.*, 15 Fed. (2nd) 16.

Upon this appeal the Circuit Court of Appeals in substance held that the issues in the two cases were identical and that the Court would not be disposed "through the medium of this case to retry the other case and in effect reverse its decision".

Aside from this position the Court declined to pass upon the merits of the case on the ground that it presented a moot question, since the controversy had been fully disposed of by the petitioner's completing its work upon its own terms. It affirmed the decree of the District Court.

It is this decision of the Circuit Court of Appeals that is now to be reviewed by this Court.

The points raised by the petitioner upon this state of facts are enumerated in its specification of errors and are fully discussed in its brief.

In opposition to the petitioner's contentions the respondents maintain:

1. That the Circuit Court of Appeals properly declined to pass upon the merits of the case beyond reiterating its previous position in upholding the validity

of Sections 132 and 133 of the Brotherhood Constitution, for the reason that the case presented a purely moot question.

2. That the Circuit Court of Appeals properly held that its prior decision in *Barker Painting Company* v. *The Brotherhood, et al.*, 15 Fed. (2nd) 16, disposed of the merits of the controversy herein because the identical issue was involved in both cases.

3. That the Circuit Court of Appeals properly declined to modify its decision in the earlier case of *Barker Painting Company* v. *The Brotherhood, et al.*, 15 Fed. (2nd) 16, because Sections 132 and 133 of the Brotherhood Constitution are not invalid and void, and the respondents were within their rights in attempting to enforce the provisions of the said sections in their dealings with petitioner, and particularly:

A. That the rule is not unreasonable;

B. That the respondents' efforts to enforce such rule do not constitute an unlawful boycott;

C. That the respondents' efforts to enforce the said rule through organized and concerted action do not constitute an unlawful combination;

D. That the respondents' efforts to enforce the said rule do not constitute a combination in restraint of trade in violation of the Federal anti-trust laws.

4. That the construction of the New Jersey statute entitled "An Act Relative to Persons Combining and Encouraging Other Persons to Combine" (P. L. 1883, p. 36, 3 Comp. St. of N. J., p. 3051) is not involved in this

case and the decision of the Court below does not so construe the said statute as to make it offensive to the provisions of the Fourteenth Amendment.

POINT I.

The Circuit Court of Appeals properly declined to pass upon the merits of the case beyond reiterating its previous position in upholding the validity of Sections 132 and 133 of the Brotherhood Constitution, for the reason that the case presented a purely moot question.

Petitioner, a New York corporation, with its principal office in the City of New York, secured a contract to supply labor and material necessary to complete the painting upon a building erected in the Town of Somerville, Somerset County, New Jersey. The wage scale for the City of New York is $10.50 a day for eight hours' work, five days a week. The wage scale for Somerville is $8 a day for eight hours' work, five and one-half days a week. Upon petitioner's refusal to comply with the rule of the Brotherhood to pay the wage scale and observe the working conditions prescribed for the City of New York, respondents directed its men to cease work. At this time about thirty per cent. of the building had been completed. Petitioner immediately applied for and secured a preliminary injunction in effect restraining respondents' workmen from leaving the job. The preliminary injunction was obeyed; the men returned to the job and before the decision of the trial Court herein, the building had been completed at the local wage scale of $8 a day.

The controversy had thus become entirely academic and moot by the time of the appeal. Accordingly, upon this additional ground, not on the merits, the Circuit Court of Appeals affirmed the decree below. The Court said:

> "Thus it is clear the questions which the plaintiff has raised are moot because, having been saved from injury throughout the work by the preliminary injunction, it has sustained no damage by the defendants' abortive enforcement of its rules. While as a matter of fact, or, perhaps, a matter to be inferred from the averments of this bill or from their past practices, the defendants propose to continue to enforce their rules, it does not follow necessarily that they will enforce them against the plaintiff or that the plaintiff will continue in business, or that, continuing in business, it will suffer by the rules' enforcement."

Counsel for petitioner now makes the point that the Circuit Court of Appeals "misapprehended the purpose of the bill, which was aimed at a conspiracy on the part of respondents to interfere with any work of petitioner throughout the country."

A careful reading of the language of the bill of complaint as well as of the restraining clauses contained in the prayer for relief (Bill of Complaint, p. 16, par. 2) makes it perfectly clear that the bill of complaint was conceived and filed to prevent interference by respondents with the particular painting job for which petitioner had contracted on a particular building in the Town of Somerville, New Jersey. That interference has long since been removed and is not now present. Petitioner completed its work upon the building and fully

performed its contract without damage to itself. To use the language of Mr. Justice Sutherland in the case of *Brownlow* v. *Schwartz*, 261 U. S. 216, "an affirmance would ostensibly require something to be done which has already taken place; a reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court has declined to entertain."

It would doubtless be convenient for petitioner to secure an expression by this Court as to its probable attitude in the event of a later attempt by respondents to enforce the rules of its Constitution involved here in connection with another job which the petitioner may undertake some time in the future in some other place. But this desire for expression of opinion upon an abstract proposition is precisely what the decisions of this Court have uniformly designated as moot. Courts sit to determine particular controversies and have consistently refused to pass upon abstract propositions of law even though the course of the future action of litigants may thereby more safely be outlined. The bill of complaint alleges no threatened action on the part of respondents to enforce its rules in connection with any particular job on which petitioner is now engaged.

Counsel for petitioner states that respondents mean to enforce the rules of their Constitution. This may or may not be so. Until such intention to enforce the rules takes the form of actual interference or actual threat of interference with the work on a particular job of petitioner, this Court will not concern itself with such abstract possibilities. Counsel surely would not assert that it is the province of this Court to determine the

validity of any rule of the Union relating to wages, hours of work or other subjects, unless and until such a rule were actually put into operation in a particular case. It is a pure matter of speculation that the respondents and the petitioner will again come into actual conflict over the rules here involved.

The uniform decisions of this Court leave no doubt that the absence of a controversy makes this appeal moot. The case of *California* v. *San Pablo and Tulare R. Co.*, 149 U. S. 308, contains an excellent statement of the rule frequently referred to by later decisions of this Court. The State of California sued the defendant railroad to recover certain taxes. Pending appeal to this Court, the defendant deposited the full sum due in a bank in plaintiff's name. This Court thereupon dismissed the appeal with the following statement of the rule:

> "The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decision. But the Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

In *Brownlow* v. *Schwartz, supra,* a writ of mandamus was issued to compel a public commissioner to grant a permit to erect a building. Before the appeal came on

the permit was issued and the building erected, and the property itself transferred to other parties. This Court declined to review the case.

The case of *Mills* v. *Green,* 159 U. S. 651, involved the attempt of the plaintiff to secure the right to vote for a delegate to a state constitutional convention. Before the appeal came on, the delegates had already been elected and the convention assembled. The appeal was dismissed with the following opinion:

> "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.
>
> It necessarily follows that when pending an appeal from the judgment of a lower Court, and without any fault of the defendant an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the Court will not proceed to a formal judgment, but will dismiss the appeal."

In *Commercial Cable Co.* v. *Burleson,* 250 U. S. 362, the plaintiff attempted to enjoin the Post Master General from interfering with its property. Pending appeal from a decree dismissing the bill of complaint, the property was returned upon the order of the President who, by proclamation, had assumed control of the transportation company. The Court said:

> "But we are of opinion that these anticipations of possible danger afford no basis for the sug-

gestion that the cases now present any possible subject for judicial action, and hence it results that they are wholly moot and must be dismissed for that reason."

In *United States* v. *Alaska Steamship Co.*, 253 U. S. 113, the Interstate Commerce Commission had issued an order requiring new forms of bills of lading. The carriers sought to enjoin such order from going into effect. Pending appeal the matter became moot as a result of an enactment of Congress requiring certain changes in bills of lading. The carriers, nevertheless, desired this Court to pass upon the power of the Interstate Commerce Commission to prescribe changes in bills of lading. This Court refused to determine the abstract question in the absence of an actual controversy and said:

"It is true that the determination of it underlies the right of the Commission to prescribe new forms of bills of lading, but it is a settled principle in this Court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot, and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the Court or

in any other case, can enlarge the power, or affect the duty, of the Court in this regard. *California* v. *San Pablo and Tulare R. Co.*, 149 U. S. 308, 13 Sup. Ct. 876, 37 L. Ed. 747; *U. S.* v. *Hamburg-Amer. Line*, 239 U. S. 466, 475, 476, 36 Sup. Ct. 212, 60 L. Ed. 387, and previous cases of this Court therein cited."

In *United States* v. *Evans*, 213 U. S. 297, the Court said:

> "When the judgment appealed from cannot be affected by the decision of the Appellate Court the case becomes a moot one and the appeal should be dismissed; hearing and deciding such an appeal, for the purpose of establishing a rule of observance in cases subsequently arising, is not an exercise of judicial power."

See also:

Maloney v. *Condon*, 189 U. S. 64, 47 Sup. Ct. Rep. 709;

American Book Co. v. *Kansas*, 193 U. S. 49, 48 Sup. Ct. Rep. 613;

Southern Pacific Terminal Co. v. *I. C. C.*, 219 U. S. 498, 55 Sup. Ct. Rep. 310.

The three cases cited by petitioner in its brief, are clearly distinguishable. They did not in any way involve moot questions. In each case an actual controversy was presented.

In *Bedford Cut Stone* v. *Journeymen S. C. Assn.*, 274 U. S. 37, both a strike and lockout were in progress incidental to the attempt by the Union to enforce a rule of its constitution. . Counsel's quotation from that case

merely holds that where a concrete controversy and threats exist, equity will intervene in the particular situation to avert probable injury without waiting for the occurrence of actual injury.

The case of *Thompson Machine Co.* v. *Brown*, 89 N. J. E. 326, 328, 104 Atl. 129, involved the threat of injury during a strike which was actually in progress.

In *Vicksburg Water Works* v. *Vicksburg*, 185 U. S. 66, 82, the facts disclosed an attempt by the City of Vicksburg to deprive the plaintiff of its rights under an existing contract which it had with the City for the supply of water for the public. The City attempted to repudiate the contract and to compel the plaintiff to sell out to the City for an inadequate consideration. A resolution of the Mayor and Aldermen denied that the contract existed. The City also filed a bill in chancery alleging that the contract was null and void, and that the rates were exorbitant. The plaintiff prayed for an injunction restraining the City from assuming to abrogate the contract and from taking away its franchises and from attempting to coerce the plaintiff to sell its property for an inadequate price. Under these circumstances, the Court refused to wait until damage was actually done.

POINT II.

The Circuit Court of Appeals properly held that its prior decision in *Barker Painting Company* v. *The Brotherhood, et al.*, 15 Fed. (2nd) 16, disposed of the merits of the controversy herein because the identical issue was involved in both cases.

Petitioner, in its brief, states that the Circuit Court of Appeals declined to consider the merits of the appeal because of its prior decision in *Barker Painting Company* v. *The Brotherhood,* 15 Fed. (2nd) 16. This is not so. A reading of the opinion by Judge Woolley, writing for the Circuit Court of Appeals, discloses that the decision affirming the decree of the District Court was placed upon two grounds: First, the Court refused, in effect, to reverse its prior holding since it found no new facts in the case at bar which differentiated it from the facts in the earlier case or which raised any new question of law. This is a distinct holding upon the merits. Secondly, and, as an additional reason, complete in itself, because the controversy is now moot.

That the decision of the Circuit Court below was made upon the merits is clearly indicated by the language of the Court which we here quote at length:

> "Of course we should not be disposed, through the medium of this case, to re-try the other case and in effect reverse its decision if the two cases are based on substantially the same facts and this one, therefore, raises no new question of law or no new aspect of an old question. Realizing this, counsel for the plaintiff selected expressions

from our opinion in the Pennsylvania case in which he found an implication that we had rather summarily and without full consideration disposed of that case because on appeal from a decree merely refusing a preliminary injunction and, pointing to the difference between the two decrees —there interlocutory, here final—represented that the evidence, which in that case we said (as a caution against commitment on another state of facts) was not sufficient to invoke the extraordinary remedy of injunction, is supplied in this case by evidence which does justify such a remedy, and, thus setting up a new case, asked for a reconsideration of the law and reversal of our previous position.

We heard the argument at length. *On our study of the record we of course found the facts in this case different from those in the Pennsylvania case as to place of work, personnel, dates, etc., but similar in character and action, and found no new facts which differentiate this case from the other or raise any new question of law. The same questions run through both cases, as indeed they do in all the reported cases on the subject whether decided on interlocutory or final decree. New Jersey Painting Co.* v. *Local No. 26,* 93 N. J. E. 108; 122 Atl. 622; reversed 96 N. J. E. 632; 126 Atl. 399; *Hass, Inc.* v. *Local Union No. 17,* 300 Fed. 894; *Marshall* v. *Brotherhood, Common Pleas, Philadelphia,* not reported; *Douglas & Bros. Inc.* v. *Malette,* Superior Court, Rhode Island, not reported; *Barker Painting Co.* v. *Brotherhood,* 15 Fed. (2d) 16, certiorari denied, 273 U. S. 747; *Barker Painting Co.* v. *Brotherhood,* 23 Fed. (2d) 743, certiorari denied, 276 U. S. 631."

Thus the Circuit Court below, upon the merits, and after "study of the record" and after "hearing argument at length", and finding the facts herein similar in character and action to those involved in the Pennsylvania case, and the same questions of law, affirmed the decree herein upon the same grounds and reasoning as in the Pennsylvania case previously decided.

POINT III.

The Circuit Court of Appeals properly declined to modify its decision in the earlier case of *Barker Painting Company* v. *The Brotherhood, et al.*, 15 Fed. (2nd) 16, because Sections 132 and 133 of the Brotherhood Constitution are not invalid and void and the respondents were within their rights in attempting to enforce the provisions of the said sections in their dealings with petitioner.

A.

SECTIONS 132 AND 133 OF THE CONSTITUTION OF THE BROTHERHOOD ARE REASONABLE AND VALID AND THE STRIKE ATTEMPTED BY THE RESPONDENT LOCAL OF THE BROTHERHOOD WAS A LEGITIMATE EXERCISE OF A RIGHT CONFERRED BY LAW ON ORGANIZED WORKERS.

A union of workers is not called upon to justify a strike of its members. If such strike is claimed to be unlawful because called for an unlawful object or conducted by unlawful means, the burden of proving such unlawfulness rests upon the party asserting the same.

In *The Barker Painting Company* v. *the Brotherhood of Painters, Decorators and Paperhangers of America, et*

al. (15 Fed. (2nd) 16), the Circuit Court of Appeals for the Third Circuit has summarized the law on the subject in the following language:

> "The courts * * * re-state what is now settled law 'that employers have no vested interest in the labor of workers and their workers have a right, individually and collectively, to lay down terms on which they will sell their labor for the highest return they can obtain, and when not satisfied, they have a right to strike. So long as they do this in their own interest, not with the purpose of assailing others, and do it in a manner not in itself unlawful, the courts will not interfere'. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797; *Mayer* v. *Journeymen Stonecutters Ass'n*, 47 N. J. Eq. 531, 20 Atl. 492; *My Maryland Lodge* v. *Adt*, 100 Md. 238, 249, 59 Atl. 721; *Bossert* v. *Dhuy*, 221 N. Y. 342, 117 N. E. 582; *National Protective Ass'n* v. *Cummings*, 170 N. Y. 315, 321, 63 N. E. 369; *Toledo, etc. R. R. Co.* v. *Pennsylvania Co.*, 54 Fed. 730."

This statement of the law is in full accord with the best authorities on the subject.

In *National Protective Association* v. *Cummings*, 170 N. Y. 315, the Court of Appeals of the State of New York, in a very elaborate opinion, summarized the prevailing doctrine with respect to the right of workers to strike as follows:

> "The same rule applies to a body of men who, having organized for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, but if it seems to be

in their interest as members of an organization to refuse longer to work, it is their legal right to stop. The reason may no more be demanded, as a right, of the organization than of an individual, but if they elect to state the reason their right to stop work is not cut off because the reason seems inadequate or selfish to the employer or to organized society."

That the doctrines so clearly announced in *National Protective Association* v. *Cummings,* are also accepted in New Jersey is made apparent by the following excerpts from the forceful and lucid opinion of Vice-Chancellor Stevenson in *Jersey City Printing Co.* v. *Cassidy,* 63 N. J. Eq. 759:

"From an examination of the cases and a very careful consideration of the subject, I am unable to discover any right in the courts, as the law now stands, to interfere with this absolute freedom, on the part of the employer, to employ whom he will, and to cease to employ whom he will and the corresponding freedom on the part of the workman, *for any reason or no reason* to say that he will no longer be employed and the further right of the workmen of their own free will to combine, and meet as one party—as a unit—the employer, who, on the other side of the transaction, appears as a unit before them. Any discussion of the motives, purposes, or intentions of the employer in exercising his absolute right to employ or not to employ as he sees fit, or of the free combination of employees in exercising the corresponding absolute right to be employed or not as they see fit, seems to me to be in the air. * * *"

The rule is stated in Ruling Case Law, Vol. 16, page 434, in the following language:

> "The right of workmen who are not under contract, to quit singly or in a body is not now an open question. The fact that they do so by preconcerted arrangement is not material. It is likewise immaterial whether they have cause for quitting. They have the same right to quit without cause as the employer has to discharge them without cause. They need not give any reasons for their conduct. Their reasons may seem inadequate to others, but if it seems to be in their interest as members of an organization to refuse longer to work, it is their legal right to stop. The reason may no more be demanded, as a right, of the organization than of an individual."

But even upon the theory that the union is under a duty of justifying the strike, the defendants have fully met the test in this case.

The strike alleged to be conducted by them is for the purpose of enforcing the provisions in their constitution set forth in Sections 132 and 133.

The motive and object of the Brotherhood of Painters, Decorators and Paper Hangers of America in adopting the said rule are explained by the witness Joseph F. Kelley, Vice-President of the Brotherhood substantially as follows: The employing painters in the United States may be divided into two classes with respect to the scope and character of their work, to wit, local concerns, who confine their work to their own localities and national concerns, who are called upon to do work in all parts of the country. The home offices of the latter center principally in the largest cities such as New York, Chicago

and Boston. The work done by such "national" painting contractors is distinguished from that ordinarily done by local concerns qualitatively or quantitatively, *i. e.*, it is either decorative work on especially fine buildings, such as public buildings, churches, theatres, banks or expensive private residences, or work of a commercial character involving large operations, such as loft or office buildings, manufacturing plants or wholesale housing developments.

Since both of such classes of work are apt to be in great demand in the large cities and industrial centers, such places attract and develop journeymen painters of skill and efficiency above the average and their rate of wages is fixed accordingly.

In smaller towns and localities, the ordinary painting work is as a rule done by local contractors employing local workers, but when such a town requires painting work on an especially fine building or on an operation of unusual size, the work is frequently given to "national" painting contractors, *i. e.*, large concerns with a national reputation whose home office is in New York, Chicago or other large city. The "national" contractor in such case bases his charges on the labor cost in his home town, unless the local wage rate is higher, which is very rarely the case (pp. 101-110).

Since the special character of the work, which the national contractor is called on to do in small towns often requires a higher degree of skill or experience than that possessed by the local journeymen painters, the contractor as a rule sends a number of his employees into such town to do all or part of the work. Journeymen painters, particularly those of New York, Chicago and other large cities, are thus often required to travel to other parts of the country to do their work.

This custom has given rise to a complexity of problems within the industry. Local artisans complained of being displaced by painters coming from New York or other large centers to do jobs in their localities, and in order to do justice to such local workers while taking account of the special needs of the builder, the rule was established to the effect that at least one-half of the painters employed on a local job shall be workers of the locality.

Another serious problem arising from the situation concerned the terms of employment, *i. e.*, wages and hours of labor on such jobs. If we assume that a painting job is being done on a building in the State of New Jersey by an employing painter of the City of New York, and that twenty men are employed on the job, one-half of them coming from New York where the prevailing rate of wages is $10.50 per day, and the other half coming from the particular locality in New Jersey, where the prevailing wage is $8.00 per day, and the men are doing the same work, the question arises what scale is to be applied to the job. Three possibilities presented themselves to the convention of the Brotherhood in its attempt to solve the problem:

1. The payment of different wage rates to the workers engaged in the same work on the same job. This was rejected as an unjustifiable discrimination and as a practice apt to create jealousies and antagonisms among the workers and to impair the efficiency of their work as well as the integrity and morale of the organization.

2. To apply the lower wage rate, prevailing in the locality, to all workers on the job. This, too, was rejected for the reason that it would be manifestly unfair to

require, say a worker coming from New York and compelled to live away from home, to work for a smaller wage than he would receive if he had remained working at home.

3. To apply the higher scale to all workers engaged on the job. This was adopted as the most equitable solution, and one most nearly just to both classes of workers, as well as to the employer. A contracting firm of New York or other large center in undertaking a country job always figures upon the wages and cost of production prevailing in its home territory, and a country builder engaging a New York painting contractor, figures on New York costs and is prepared to pay somewhat more than he would have to pay to a local contractor.

Mr. Kelley's testimony on this phase of the question is as follows:

> "Q. Mr. Kelley, in undertaking an outside job, is it customary for the contractor to take some of his employees in his home city to such outside jobs? A. Mostly every case, yes, sir.
>
> Q. And prior to the enactment of the present constitutional provision of your Brotherhood what wages would the men so taken to the outside job be paid? A. He would get the higher rate of wages. If he was leaving his home city and it was higher he would get that, and if it was going to a city where it was higher he would have to receive the higher rates of wages there.
>
> Q. In a case where the job was undertaken by a national concern in New York to be executed say somewhere in New Jersey and some of the New York employees would be sent to said job, they would get the New York rate? A. Yes, sir.

Q. And in such cases would the men coming from New York frequently work with local men on the same job? A. Yes, sir.

Q. And prior to the enactment of this rule what wages would the local men get? A. Well, as I said before, in a number of instances the employer coming in would offer them some inducements to work for, as I said, five or ten cents an hour more or make some extra inducements to them. In a few instances they might have worked for local conditions.

Q. Within your experience as member of the general executive board and as the representative of the Brotherhood within your respective territory, did any friction ever come to your notice on account of the diversity of wages paid on the same job to men coming from one city or from the other? A. Yes, sir.

Q. Or any disputes between workers and employers on that ground? A. Yes, sir.

Q. Do you know of any strike having been caused by such conditions? A. I cannot just figure where—just now where there was any strike directly, but we have had lots of friction and it would lead us to strike if we were not to adjust them to the satisfaction of our men and the employer.

Q. Have you had many occasions to adjust such disputes? A. Yes, sir.

Q. Arising out of the diversity of wages paid on such jobs? A. Yes, sir; I have had some" (pp. 113, 114).

and again with respect to the motives that actuated the convention of the Brotherhood of Painters, Decorators

and Paperhangers of America in adopting the rule under discussion:

> "Q. I say, will you summarize briefly—state briefly the reasons which were advanced for the adoption of this amendment at your convention? A. I thought I explained those early in the affair. Of course, I said that the reasons advanced were on account of the members knowing and believing that all this work was estimated at the higher rate, and again for to keep down the friction that would exist where there were two scales of wages.
>
> Q. On the same job? A. On the same job, and by the same employer, which isn't—doesn't mean very much organization. So—in order that the job would go along smoothly and efficiently because where there was friction it generally follows that the employer is not getting what belongs to him, so far as that is concerned, and in order that there should be a just and equitable wage, because in a number of instances the men were working alongside of men and doing, in instances, the same class of work, and they believed that they were justified in their contention of getting as much money as their fellow brothers coming from the other cities. All of those were things that were discussed" (pp. 116-117).

The petitioner in its brief herein argues that there is no sufficient proof in the record to support the contention that prior to the enactment of the rule there was frequent friction between members of the organization engaged on the same job at different wages.

It is respectfully submitted that the witness Joseph F. Kelley, Vice-President of the Brotherhood, in charge of the Eastern District, and for many years in direct and

personal touch with the situation in the painting industry and particularly with the conditions and relations of the members of his own union, was fully competent to testify as to the existence of such friction and that it was entirely unnecessary and impossible to enumerate every case of such friction that had arisen among the workers in the fifteen years preceding the trial of the case.

In numerous instances also, the petitioner refers to the state of "harmony" alleged to have existed between the workers before the enactment of the rule under discussion. This, it is respectfully submitted, is a purely gratuitous assumption. There is absolutely no proof in the record of any such harmony.

The question before the Court furthermore is not whether there actually was much friction between the workers before the enactment of the rule. It is sufficient that the delegates at the Dallas convention of the Brotherhood believed in good faith that there was such friction and that the enactment of Sections 132 and 133 would tend to obviate or minimize such friction.

Whether the rule thus adopted by the Brotherhood is wise and whether it represents the best possible solution of the peculiar labor problems in the painting industry is a question upon which opinion may be divided, but it is not questioned and cannot be questioned that the rule was adopted by the members of the Brotherhood in good faith and in the belief that its enforcement would prevent unfair discrimination and destructive jealousies and rivalries among its members and result in the preservation of their standard of life without doing an injustice to the employers.

Thus viewed, it is a condition which the organized painters of this country attach to their labor in the same way as the wage scale, work hours and other

conditions upon which they are willing to perform work for employers.

The rule thus established by the Brotherhood has the triple aspect of a wage regulation, an effort to secure equitable distribution of work among its members and of a measure to preserve the integrity of the organization and harmony among its members, and it is respectfully submitted that all these are legitimate objects of trade union activity and that organized workers have a lawful right to enforce the same by strike.

The right of workers to strike to maintain or advance a rate of wages is so firmly established in law that no citation of authorities is required to support the contention. It is quite obvious that the prime object of the rule attacked herein is to establish a standard of wages. It appears from the testimony herein that the scale of wages of journeymen painters is not uniform throughout the country but varies from place to place, being determined in each case by divergent factors, such as the local cost of living, the relation between the local demand and supply of labor, the efficiency of the workers' organization, etc. One difference in the wage rates is thus based on geographical lines: a painter operating in New York, even though he may live in New Jersey, gets a higher rate of wages than if he had been working in New Jersey and *vice versa*. The rule attacked herein adds another ground of wage variation, *i. e.*, the location of the employers' home office and the possible employment by him of workers from his home city in other places. Reduced to its simplest terms, it means that a New York concern, which as a rule gets New York prices for work it undertakes in any part of the country, shall pay New York wages to its employees no matter where employed. From the workers' point of view it

means that the members of the Brotherhood of Painters, Decorators and Paper Hangers of America refuse to work for a New York concern anywhere in the United States for less than New York wages.

The right of an individual and single worker to make different conditions as to his wages to different employers depending upon the location of the work or the location of the employer can, of course, not be questioned, and it is respectfully submitted that the same right must be accorded to groups of workers acting in concert.

While it may be admitted that labor unions cannot in all cases claim the right to secure the performance or non-performance of an act "merely because a single person can do so" it obviously cannot be contended that a labor union has no right to enforce the performance of a certain condition collectively merely because a single person has such right.

The cases in which concerted action on the part of a body of workers has been held unlawful, have invariably been such in which either the object sought to be attained had no bearing on the interests of the workers or in which the methods employed were in themselves unlawful.

The case of *Jersey City Printing Co. v. Cassidy, supra*, is illuminating on this point. It was there held that defendants, members of a labor union were endeavoring by threats or persuasion to have plaintiff's employees under contract to render service, break their contract, and an injunction was granted to restrain such interference. The decision was based not on the fact that the acts complained of were those of a combination, but on the fact that the acts in themselves were un-

lawful, whether committed by a single individual or by a group acting in concert. The following excerpt from the opinion makes this evident:

> "Where defendants in combination or individually undertake to interfere with and disrupt existing contract relations between the employer and the employee, it is plain that a property right is directly invaded."

In *Roddy* v. *United Mine Workers of America*, 139 Pac. 126, 41 Okla. 621, the Court said:

> "We think under the better authority that what an individual may do, a number of his co-laborers may join him in doing, provided the thing to be done is lawful."

The same view was expressed in *National Protective Assn.* v. *Cummings*, *supra*.

> "Whatever one may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act."

In *Clemmitt* v. *Watson*, 14 Ind. App. 38, 42 N. E. 367, the Court said:

> "Each one could have quit without incurring any civil liability to him (the employer). What each one could rightfully do, certainly all could do if they so desired, especially when their concerted action was taken peaceably, without any threats, violence or attempt at intimidation."

The following extract from the opinion of Mr. Justice Taft in *Toledo etc., Co.* v. *Penn. Co.* (C. C.) 54 Fed. 730, 19 L. R. A. 387, illustrates the principle here discussed:

> "Such combinations are said to be unlawful

conspiracies, though the acts in themselves and considered singly are innocent, when the acts are done with malice, i. e., with the intention to injure another without lawful excuse."

The numerous authorities cited by petitioner in its brief do not in any way affect the rule that lawful objects are not made unlawful by the mere fact that they are being pursued by a combination.

All that these authorities show is that the attempt to establish closed shops or to force the discharge of non-union employees or to prevent the handling of non-union made material or the employment of apprentices, have been held to be unlawful objects of combinations in some jurisdictions.

The rule of the Brotherhood attacked herein is organically coupled with another rule to the effect that in all cases in which an outside employer undertakes work in any locality, he must employ at least 50% of local labor. Under the custom of awarding painting work of extraordinary quality or volume in small towns to contractors in large cities above described, the local painters are often deprived of an opportunity to do the work in their own locality. Such local painters have the undoubted right to insist upon getting all the available painting work in the industry and to strike for the enforcement of such a demand (*Pickett* v. *Walsh*, 192 Mass. 572, 78 N. E. 253; *Bossert* v. *Dhuy*, 221 New York 342) and it seems clear that such local painters have an equal right to say that they will forego a part of the available local work in favor of outside employees, provided that they are paid the same rate of wages as such outside employees. From this point of

view Sections 132 and 133 of the constitution of the Brotherhood must be considered as a measure for equitable distribution of available work among local and outside painters, coupled with a uniform wage regulation as part of such arrangement and thus comes squarely within the principle of *Minasion* v. *Osborne*, 210 Mass. 250, 96 N. E. 1036, in which the Court said:

> "The right of one person to dispose of his labor freely is not superior to the same rights in others. The right of one to work under unsanitary conditions does not go to the extent of preventing others from striking in order to secure mitigation of these conditions merely because such a strike may interfere with the desire of the first to continue to work under those conditions. The same principle applies where a distribution of work discriminates between men of average capacity and gives an undue preference to one over another in times where there is a dearth of work. A system of giving out work which under existing conditions, operates unjustly, is a condition of employment in which all men affected by it in a particular shop may have a legal interest. Nor is injury to the employer a reason why a strike to remedy such condition should be enjoined.
>
> The right of the employer is no more absolute in respect of a condition of employment like this than it is as to hours of labor or rates of wages. It is not a subject on which he is entitled to special protections against an orderly and otherwise lawful strike. *Pickett* v. *Walsh*, 192 Mass. 582. *The conduct of these defendants* • • •, *appears to have sufficient justification in the fact that it is of a kind and for a purpose, which has a direct relation on the benefits of a more uniform*

distribution of work, and thus of wages among equally skilled or competent workmen during dull seasons."

But even if the rule of the Brotherhood whose validity is attacked herein could not be upheld as a wage regulation, or as an effort to distribute all available work equitably among its members, it must be held to be valid in law and a justifiable cause for a strike as a measure to preserve the "integrity of the union."

The testimony of the witness Kelley is to the effect that the payment of varying wages to workers on the same job and the preference given to workers from other cities over local workers, often resulted in friction and disharmony among the members of the union and that the practice had a tendency to undermine the morale of the union. The rule adopted by the Brotherhood is designed to preserve the efficiency and integrity of the union. This testimony is entirely uncontradicted.

That the strike may cause incidental injury to the employer in no way affects its validity.

As stated in Corpus Juris, Vol. 12, page 570:

> "As long as the strike is for a legitimate purpose, the fact that injury results to the employer does not alter the character of the act and render it unlawful. Indeed it may readily be seen that if the quitting of the employment resulted in no injury to the employer, the object of the combination would necessarily fail."

In *National Protective Assn.* v. *Cummings, supra,* the Court said:

> "The struggle on the part of individuals to prefer themselves, and to prevent the work which

> they are fitted to do from being given to others, may be keen and may have unhappy results in individual cases; but the law is not concerned with such results, when not caused by illegal means or acts."

In *Bossert* v. *Dhuy, supra,* it was held that if a strike is conducted in good faith, to better the condition of the strikers and not to injure an employer

> "the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against such action."

Similarly it was held in *Mills* v. *U. S. Printing Co.,* 99 App. Div. 605 (N. Y.):

> "nor does the incident or private injury necessarily attendant upon execution of such general plan (a strike for more pay or better working conditions) render unlawful the general scheme."

In *National Fireproofing Company* v. *Master Builders Association,* 169 Fed. 259, the principle is set forth as follows:

> "Several laborers and builders may combine for mutual advantage and so long as the motive is not malicious the object not unlawful nor oppressive, and the means neither deceitful or fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons."

The following excerpt from the opinion of the Court in *State* v. *Stockford,* 77 Conn. 227, 58 Atl. 769, is to the same effect:

> "Workmen may lawfully combine to accom-

plish their withdrawal in a body from the service of their employers, for the purpose of obtaining an advance in wages, a reduction of the hours of labor or any other legitimate advantage, even though they may know that such action will necessarily cause injury to the business of their employers, provided such abandonment of work is not in violation of any continuing contract, and is conducted in a lawful manner, and not under such circumstances as to wantonly or maliciously inflict injury to person or property."

The Court of Appeals of Maryland thus expressed the principle (*My Maryland Lodge* v. *Adt.*, 100 Md. 238, 59 Atl. 721):

> "If ruin to the employer results from their peaceable assertion of these rights, it is a damage without a remedy."

So likewise the Supreme Court of Minnesota has declared (*Gray* v. *Building Trades Council*, 91 Minn. 171, 97 N. W. 663):

> "A strike for the purpose of securing better wages or otherwise bettering the condition of the strikers is not unlawful, though the result thereof is a combination between the striking employees and results incidentally in the injury of others. *Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 224, 55 N. W. 1119."

In *Arthur* v. *Oakes*, 63 Fed. 310, the Court said:

> "Such a loss, under the circumstances stated (the quitting of work to secure wages deemed just), would be incidental to the situation, and could not be attributed to employees exercising lawful rights in orderly ways."

In *Allis-Chalmers Co.* v. *Iron Moulders Union No. 125*, 150 Fed. 155, 171, the Court recognized the action of a combination of workers to be lawful

> "So long as the combination is merely taking measures to secure its own legitimate advantage or economic advancement, although harm may incidentally result to the employer."

See also:

Karges Furniture Co. v. *Amalgamated Woodworkers' Union*, 165 Ind. 421, 75 N. E. 877.

B.

THE RESPONDENTS' EFFORTS TO ENFORCE THE PROVISIONS OF SECTIONS 132 AND 133 OF THE BROTHERHOOD CONSTITUTION DO NOT CONSTITUTE AN UNLAWFUL BOYCOTT.

The petitioner throughout its brief persists in characterizing the respondents' efforts to enforce Sections 132 and 133 of the Brotherhood Constitution as a "boycott". The facts in the case are perfectly clear and practically undisputed, and their character and effect are in no way changed by stigmatizing them as a "boycott" or labeling them with any other name. Even a boycott is not always unlawful.

In any event, however, the term "boycott" as used in legal phraseology has no application to the facts in this case. The term is defined by the authorities as follows:

"BOUVIER'S LAW DICTIONARY:

Boycott—An organized effort to exclude a person

from business relations with others by persuasion, intimidation and other acts which tend to violence, and thereby to coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs."

"16 R. C. L., Page 477:

The term boycott, as generally understood, is a combination to harm one person by coercing others to harm him. As applied to labor union, 'boycott' is generally defined as an attempt, by arousing a fear of loss, to coerce others, against their will, to withhold from one denominated unfriendly to labor their beneficial business intercourse. A boycott has been defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation and other acts, which tend to violence, and thereby cause him through fear of resulting injury to submit to dictation in the management of his affairs."

"BLACK—LAW DICTIONARY:

Boycott—A conspiracy formed and induced directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of any one by wrongfully preventing those who would be customers from buying anything or employing the representatives of said business by threats, intimidation or other forcible means."

"WORDS AND PHRASES:

> Boycott—A conspiracy to 'boycott' is a confederation, generally secret, of many persons, whose intent is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution and avengeance of the conspirators."

The essential features of an unlawful boycott thus involve the following elements:

(1) An organized combination

(2) directed against specific persons or corporations

(3) with intent to do them injury or harm

(4) by inducing others to withdraw business intercourse

(5) through threats, violence or other coercive measures.

None of the tortious elements above-mentioned is present in the case at bar.

The respondents did not attempt to induce any third parties to withdraw business patronage or intercourse from the petitioner. All they said was that their own members would not work for the petitioner for less than a stipulated wage rate. Their object was not to hurt the petitioner but to benefit themselves. They did not resort to violence or intimidation and did not seek to exercise coercion upon persons dealing with the petitioner. They were purely passive in their refusal to accept the petitioner's terms of payment for their labor.

Under no stretch of imagination can the respondents' acts be held to constitute a "secondary boycott", which alone meets with the condemnation of the law.

The distinction between a so-called "primary boycott" and a "secondary boycott" has been lucidly stated by this Court in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, in the following language:

> "The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant and produced by what is commonly known as a 'secondary boycott', that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it."

and even more fully by Clark in The Law of the Employment of Labor, pp. 289, 290, as follows:

> "A distinction is sometimes drawn between what are classed as primary and secondary boycotts. In the former, the action is directly against the offending employer, the members of the organization simply withholding their patronage as laborers or purchasers, and inducing their fellows to do the same. The mere withholding of patronage or refusal to trade is not unlawful, and the announcement or publication of such a purpose is within the rights of the persons agreeing together, even though it results in the injury of the person against whom the acts are directed. And it will follow that persons freely joining in such withholding of business intercourse will not by their acts inculpate either themselves or the orig-

inal actors. But such is not the usual course of the boycott; and indeed the definitions usually adopted do not cover such acts, but are applicable only to the second class, or the so-called secondary boycotts (sometimes called compound boycotts), which are generally understood to mean combinations to harm one person by coercing others to harm him."

Petitioner quotes at length from cases cited on pages 46, 47 and 48 of its brief to show that a combination of persons has a power for evil not possessed by an individual. This is not disputed. However, the fallacy of petitioner's position is its attempt to make the mere combination unlawful *per se*. The combinations condemned by the authorities on which petitioner relies are in each instance such as pursue unlawful ends or employ unlawful methods.

C.

THE RESPONDENTS' EFFORTS TO ENFORCE THE PROVISIONS OF SECTIONS 132 AND 133 OF THE BROTHERHOOD CONSTITUTION THROUGH ORGANIZED AND CONCERTED ACTION DO NOT CONSTITUTE AN UNLAWFUL COMBINATION.

The rule of law that workers may combine for lawful purposes although such combination may cause incidental injury to employers is based upon the recognition of the dignity of human labor.

The petitioner all through its brief has chosen to take the position that human labor is a commodity like any other article of commerce.

Thus it states on page 55:

> "If such a right is to be accorded to combinations of labor upon the theory that they have labor to sell for a price, and that must be the theory, then I submit that a similar privilege must be accorded to the sellers of any other product, and I see no reason, upon principle, why there may not be a combination of those dealing in hardware, or any other article of commerce, to sell at one price to a resident and at a lower price to a non-resident, or vice versa, and the districts may be as arbitrary as the combination of sellers desires to make them."

The appellant entirely overlooks the fact that human labor is an organic part of the very life and being of the worker and not an inanimate commodity to be bartered or sold at will.

Our courts have generally made a clear distinction between human labor and mere inanimate commodities and Congress has embodied the recognition of this fundamental distinction by statutory enactment, when in Section 6 of the Clayton Act it proclaimed that the labor of a human being is not a commodity or an article of commerce.

Proceeding on the basis of this assumed analogy between labor and commodities, the petitioner asserts the existence of a sort of property right in the employer to the labor of his workers, a "good will" in labor, and condemns the conduct of the respondent labor unions as an interference with this alleged property right of the petitioner.

The Courts have, of course, held that it is wrongful for a third party to interfere between an employer and

his workers and to induce a breach of agreement on the part of the latter. This rule has been applied to unions attempting to cause a strike among non-union employees from whom they hold no mandate. The fundamental distinction in this case is that the defendant unions were acting for themselves and their members under a provision of the Constitution voluntarily adopted by such members on a general vote and having the force of a contract between members *inter sese* and between them and their organization.

Respondent unions in this case acted as agents for the employees and with full authority from them. Thus Arthur P. Demaray, one of the petitioner's employees, testified that he obeyed the orders of Mr. Hoffman to quit "as he is our representative" (p. 49), and again that if he had known that under the rules of his union he was entitled to $10.50 a day he would have asked for such pay (p. 51).

Thomas Winsor, another of the petitioner's employees, likewise testified that he was ready to quit work as soon as he learned that the wages paid him were in violation of the union rule (p. 53), and so in substance did Joseph Housh, another of petitioner's employees (pp. 57, 58).

The petitioner's peculiar conceptions of the modern rights of labor are expressed on page 51 of its brief in the following language:

> "It is not yet necessary to pass upon the question whether or not a combination of individuals may be permitted to insist upon payment to them of a wage which is outrageous based upon no economic ground and destructive of employers as a whole. The time may be coming when *that*

question will have to be dealt with and, when it comes, there is no doubt but that the courts will deal with it by applying the *maxim sic utere*, etc."

The appellant is somewhat in error in his chronology. There was a time in the remote and dark past when the courts and other public authorities of Great Britain assumed to regulate the wages of workers, and even in the early days of our own republic a combination to raise wages was punishable as a criminal conspiracy.

> Philadelphia Cordwainer's Case (Sayre's Cases on Labor Law, p. 99).

This archaic concept has long yielded to the more modern and enlightened theory that an attempt to force labor to work at wages imposed by public authority would create a condition of involuntary servitude, in crass conflict with the fundamental principles of our Constitution.

The statement of the petitioner that every citizen of the United States has the inalienable right to acquire, possess and protect property, to follow any of the ordinary callings of life and to make contracts for that purpose, is undoubtedly sound. But two pertinent observations may be made on that point:

1. The Constitution guarantees the citizen in the right of possession of his own property and not of the property of another; it confers upon him the right to make contracts with other citizens but not to coerce the latter to submit to his terms. The petitioner in this case has the inalienable right to pursue its business and to make profits, but it has no right to force journeymen

painters to sell to it their labor, which is their property, on such terms as in its opinion are reasonable. It has the right to make contracts with respect to the wages to be paid by it, but it has no inalienable right to force such contracts on its own terms.

2. The workers likewise are citizens and enjoy equally with the employers the constitutional right to freely follow their callings and to make contracts with respect to their services. To hold that the workers have no right to attach their own conditions as to terms of compensation with respect to their labor, would be to deny them the very constitutional protection which the complainant herein invokes.

It may be perfectly true that the enforcement of the respondents' terms of employment as against the petitioner may result in damage to the latter. Concretely stated, that means that if the respondents enforce their demand upon petitioner, the latter will either have to secure better prices for its work in New Jersey, or forego some business in that State, or make less profits on the business it may be doing in it. There is nothing unusual or shocking in this situation. On the contrary, it is one that frequently confronts every business man about to make a contract of employment, purchase, sale or otherwise.

In *Whitehall* v. *Continental Tobacco Co.*, 125 Fed. 454, 461, the Court said:

> "The Tobacco Company and its employee were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or to sell to all intending pur-

chasers at the same price. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons."

The same principle applies in even a higher degree to the right of workers, acting singly or in concert, to sell their labor to different employers at different prices.

In *Lohse Patent Door Co.* v. *Fuelle,* 215 Mo. 421, 114 S. W. 997, 22 L. R. A. 407, the Court said:

> "At common law personal service—an occupation—could not be the subject of a monopoly. In discussing that question in the case of *State ex rel.* v. *Associated Press,* 159 Mo. loc. cit. 456, 60 S. W. 91, 104, 51 L. R. A. 151, 81 Am. St. Rep. 368, this Court used this language: 'But there is nothing here on which a monopoly can attach. The business is one of mere personal service—an occupation. Unless there is "property" to be affected with a public interest there is no basis laid for the fact or the charge of a monopoly' • • • We must therefore hold that the United Brotherhood of Carpenters and Joiners and their allied associations, whom the defendants represent, are not unlawful combinations made and entered into in restraint of trade, but are legal and highly laudable when confined within proper bounds."

See also:

Overland Pub. Co. v. *Union Lithograph Co.,* 207 Pac. 412;

Reihing v. *Local Union No. 52,* 109 A. 367;

Allis-Chalmers Co. v. *Iron Moulders' Union No. 125*, 150 Fed. 155;
Re Sweitzer, 162 Pac. 1134.

Prof. Williston in his work on Contracts, Vol. 3, Sec. 1655, expresses the following opinion:

> "In view of the modern social and economic attitude of large numbers of the community towards labor unions and the judicial expressions in certain cases involving, to be sure, allegations of criminal or tortious combinations, not the validity of a contract as such, *it seems probable that the ordinary principles governing contracts in restraint of trade would not now generally be applied to combinations of workmen.*"

D.

THE RESPONDENTS' EFFORTS TO ENFORCE THE RULE OF THE BROTHERHOOD DO NOT CONSTITUTE A COMBINATION IN RESTRAINT OF TRADE IN VIOLATION OF THE FEDERAL ANTI-TRUST LAWS.

Mr. Justice Smith of the Supreme Court of the District of Columbia, in his unreported opinion in the similar case of the *Barker Painting Company* v. *Brotherhood of Painters, Decorators and Paperhangers of America*, disposed of the petitioner's contention under this head in the following illuminating language:

> "It is urged, however, that the defendants in violation of the Sherman Act and anti-trust laws, combined and conspired to restrain trade and commerce in the District of Columbia and between the

States and the District of Columbia and between the District of Columbia and the States.

The terms trade and commerce as used in the Sherman Act mean interstate traffic, the interstate purchase, sale, or exchange, of commodities, the interstate transportation of persons and property and possibly the interstate transmission of messages. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203. Section 6 of the Clayton Act expressly provides that the labor of a human being is not a commodity or an article of commerce and that labor organizations shall not be construed to be illegal combinations or conspiracies in restraint of trade under anti-trust laws. Reading the Sherman Act and the Clayton Act together, it is apparent that the *Brotherhood of Painters, Local Union No. 368*, and the members thereof, cannot be regarded as a combination or conspiracy in restraint of trade or commerce."

And again:

"But, however, that may be, Section 6 of the Clayton Act specifically excludes the labor of human beings from the category of commodities or articles of commerce, and from that it necessarily results that defendants' collective rejection of employment for non-acceptance of the Brotherhood's 'higher wage' and 'shorter work' rules was not an interference with the purchase, sale, exchange, or transportation of commodities, and consequently was not a restraint of trade or commerce."

And:

"The plaintiff was not restrained by the defendants from the buying, selling, exchanging, or

transportation of goods, wares or merchandise, and no such restraint could be exercised inasmuch as plaintiff's business was not of that kind. The business of the Barker Painting and Decorating Company is painting and decorating, not merchandising or the transportation of persons or property, and therefore its business is not trade or commerce within the meaning of the Sherman Act. The plaintiff contracts to paint and decorate and its contracts are governed by the law of the place in which they are made or in which they are to be performed. Such contracts are not commodities and 'are not interstate transactions though the parties may be domiciled in different states'. *Paul* v. *Virginia*, 8 Wall. 168, at page 183."

The opinion of Mr. Justice Smith is fully in accord with the expressed attitude of this Court in similar situations.

U. S. Leather Workers International Union v. *Herker*, 265 U. S. 457, was a case of a strike accompanied by illegal picketing and intimidation of workers, which had the effect of preventing the continued manufacture of articles destined for interstate commerce, and of actually stopping the shipment of some of such articles to other states. The action was brought in the courts of the United States under the Federal Anti-Trust Law. This Court after an elaborate review of the legal principles involved held that the action was not maintainable, saying:

"The record is entirely without evidence or circumstances to show that the defendants in their conspiracy to deprive the complainants of their workers were thus directing their scheme against interstate commerce. It is true that they were, in this labor controversy, hoping that the loss of

> business in selling goods would furnish a motive to the complainants to yield to demands in respect to the terms of employment; but they did nothing which in any way directly interfered with the interstate transportation or sales of the complainant's product."

Industrial Association v. *United States,* 268 U. S. 64, was an action to restrain the defendant, an association of building contractors of the City of San Francisco, from carrying out a scheme of the association by which it was sought to exclude union labor from the building operations of San Francisco by refusing to sell to employers of such labor certain necessary building materials.

The courts below granted an injunction, holding that the action of the defendant constituted a combination in restraint of interstate commerce in violation of the Anti-Trust Act.

We quote the following significant portions of the opinion of this Court reversing the judgment of the Court below:

> "The thing aimed at and sought to be obtained was not in restraint of the interstate sale or shipment of commodities, but was a purely local matter, namely regulation of building operations within a limited local area, so as to prevent their domination by labor unions. Interstate commerce, indeed commerce of any description, was not the object of attack, 'for the sake of which the several acts and courses of conduct were done and adopted'. *Swift & Co.* v. *U. S.,* 196 U. S. 375, 397. * * *
>
> We concur with the dissenting Judge in the Circuit Court of Appeals when, in speaking of the conclusion of the majority, he said: '* * *.'

> The alleged conspiracy and the acts here complained of, spent their intended and direct force on a local situation—for building is as essentially local as mining, manufacturing or growing crops, and, if by a growing diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fruitious consequence so remote and indirect as plainly to cause it to fall outside of the reach of the Sherman Act.
>
> To extend a statute intended to reach and suppress real interferences with the free flow of commerce among the states, to a situation so equivocal and so lacking in substance, would cast doubt upon the serious purpose with which it was framed."

In *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, the Court dealt with a strike against certain coal mines in the State of Arkansas which shipped their products to other states. This Court in reversing a judgment in favor of the plaintiff said:

> "If it be said that what District No. 21 (one of the defendants) feared was that if Bache (one of the plaintiffs) were successful, the defection among union operators would spread and ultimately the whole District field of District No. 21 in Arkansas, Oklahoma and Texas would become non-union, and interstate commerce would then be substantially affected, it may be answered that this is remote and no statement or circumstance appears in the record from which it can be inferred that the participants in the local strike had such a possibility in mind or thought they were thus protecting union operators in a control or monopoly

of interstate commerce. The result of our consideration of the entire record is that there was no evidence submitted to the jury upon which they properly could find that the outrages, felonies and murders of District 21 and its companions in crime were committed by them in a conspiracy to restrain or monopolize interstate commerce."

POINT IV.

The Construction of the New Jersey Statute entitled "An Act Relative to Persons Combining and Encouraging Other Persons to Combine" (P. L. 1883, p. 36, 3 Comp. St. of N. J., p. 3051) is not involved in this case and the decision of the Court below does not so construe the said statute as to make it offensive to the provisions of the Fourteenth Amendment.

The statute in question reads as follows:

> "That it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise, or encourage by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person or persons or corporation."

The petitioner seems to argue that the decision of the Circuit Court of Appeals held directly or by implication that although the acts of the respondents complained of would be unlawful in themselves, they were legalized by the statute above quoted, and that such

alleged construction of the said statute by the Circuit Court of Appeals would render it offensive to the provisions of the Fourteenth Amendment.

In the case directly reviewed here the Circuit Court of Appeals did not discuss the merits of the case beyond referring to and re-affirming its position in the earlier case, *Barker Painting Company* v. *Brotherhood*, 15 Fed. (2nd) 16.

The opinion of the District Court which was affirmed by the Circuit Court of Appeals quotes with approval certain portions of the opinion of the New Jersey Court of Errors and Appeals in the case of *New Jersey Painting Company* v. *Brotherhood* (96 N. J. E. 632), which among other things refers to the New Jersey statute above quoted and states that a previous expression of the Court in *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.*, 77 N. J. Eq. 219, that the effect of the said statute was to merely render the combination therein described no longer indictable, was mere dictum.

But neither the District Court in this case nor the New Jersey Court of Errors and Appeals in the *New Jersey Painting Company* case based the decision upon the said statute. In both cases the courts examined the facts on the merits and held that the acts complained of were not unlawful and that the combination for the accomplishment of such acts was lawful *per se* even without the aid of the special New Jersey statute.

In the earlier case of *Barker Painting Company* v. *Brotherhood*, decided by the Circuit Court of Appeals for the Third Circuit (15 Fed. (2nd) 16), upon whose authority the judgment in the present case was affirmed

by the same Court, the case was disposed of without reference to the New Jersey statute.

The construction of that statute by the New Jersey Court of Errors and Appeals or by the United States District Court for the District of New Jersey or by the Circuit Court of Appeals for the Third Circuit is thus in no way involved in this review.

But even if this Court were called upon to pass on the question, there is nothing in the construction of the statute under consideration by the courts mentioned to render the same offensive as against the Fourteenth Amendment.

The petitioner seeks to draw an analogy between the alleged construction of the New Jersey statute by the courts above mentioned and the construction which the courts of Arizona placed upon a somewhat similar though broader statute and which this Court rejected in *Truax* v. *Corrigan*, 257 U. S. 312.

It is respectfully submitted that there is no analogy whatsoever between the two cases.

In *Truax* v. *Corrigan*, the defendants carried on a boycott against the plaintiff by picketing, using abusive language, circulating libelous statements and making threats against him, the object of the campaign being to exercise coercion "over strangers to the original controversy".

This Court held that such acts were inherently illegal; that they were not intended to be legalized by the Arizona statute, and if they were that the statute would run counter to the provisions of the Fourteenth Amendment.

In the case at bar the trial Court has found that the

record herein is barren of any showing of intimidation, violence or disorder of any sort on the part of those who ceased work, or of those representatives of the unions at whose instance the demand for higher wages was made.

There was no attempt to exercise any coercion upon third parties.

The respondents on this point quote from the opinion of Judge Runyon of the District Court for the District of New Jersey in this case.

> "The case of *Truax* v. *Corrigan*, 257 U. S., p. 312, is strongly urged in support of the alleged illegality of the rule, both as to its provisions and its operation, but as I read that case, it is far removed from the instant one.
>
> In that case the distinct object of the concerted action was to injure the plaintiff's business in order that he might be forced to meet the defendant's demands, and the means adopted to cause that loss were little short of scandalous, consisting in part, as they did, of virulent attacks upon the character, not only of the plaintiff and his business, but also of those who patronized the plaintiff. The effect of this destructive campaign was ruinous to the plaintiff's business, and the Supreme Court holds that a state statute which in practice denies legal relief in all forms, or, at the least, equitable or injunctive relief, under such circumstances, is defective, in that it fails to afford all the equal protection of the laws. The inequality in the operation of the statute was based upon the fact that it favored plaintiff's ex-employees-parties whose relationship with plaintiff had in reality ceased—in exempting them as parties to a labor dispute from the operation of a law made applicable to all others

who might seek to destroy plaintiff's business and property, and in so doing, proceed exactly as these ex-employees did."

It is moreover quite obvious from a superficial reading of Sec. 1 of the 14th Amendment that its application is limited to State Legislation and not to private contracts.

In *United States* v. *Norris*, 125 Fed. 322, the Court said:

"It is now well settled that these two amendments (13th and 14th) have reference solely to actions of the state, and not to any action of private individuals, although it is immaterial whether the state acts by its legislative, executive or judicial authority," citing *U. S.* v. *Reese*, 92 U. S. 214; *U. S.* v. *Cruikshank*, 92 U. S. 542; *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Civil Rights Cases*, 109 U. S. 3; *U. S.* v. *Harris*, 106 U. S. 629; *James* v. *Bauman*, 109 U. S. 127.

Similarly in *Marten* v. *Halbrook*, 157 Fed. Rep. 716:

"The provisions of the constitution and laws of the United States, the protection of which is sought here to invoke do not relate to or include such merely private wrongs or transgressions as those complained of. The inhibition of those enactments are against the state, its officers or agents, and not against the acts of merely private individuals acting as such."

In the *Civil Rights Cases*, 109 U. S. 3, Mr. Justice Bradley, in a complete and masterly analysis of the subject, said:

"The first section of the Fourteenth Amend-

ment (which is the one relied on) after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that:

'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

It is state action of a particular character that is prohibited. Individual invasion of individual rights, is not the subject matter of the amendment."

and again:

"It must appear as well by allegation, as proof at the trial, that the constitution has been violated *by the action of the state legislature.* Some obnoxious law passed, as that might be passed, is necessarily to be assumed in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against *state laws* impairing the obligation of contracts."

In *United States* v. *Cruikshank et al.*, 92 U. S. 542, 554, Mr. Chief Justice Waite lays down the doctrine in the following language:

"The Fourteenth Amendment prohibits *a State* from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another."

And finally in *Virginia* v. *Rives*, 100 U. S. 313, 318:

> "The provisions of the Fourteenth Amendment of the Constitution we have quoted, all have reference to State action exclusively, and not to any action of private individuals."

But even if the provision of the Brotherhood Constitution under discussion is to be given the effect of a statute passed by a State Legislature, it does not offend against the Fourteenth Amendment of the United States Constitution because the well established rule is that State Legislation does not constitute a denial of the equal protection of the laws so long as all persons subject to it are treated alike under similar circumstances and conditions in respect to the privileges conferred and to the liabilities imposed, and that a statute is not void as denying such equal protection merely because it applies only to certain persons or classes of persons.

> "Wherever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied."
>
> *Walston* v. *Nevin*, 128 U. S. 578.
>
> "The classification of subjects of such Regulative legislation, so long as such classification has a reasonable basis, and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to the citizens the equal protection of the laws."
>
> *Griffith* v. *Connecticut*, 218 U. S. 563.
>
> "Due process of law and equal protection of the laws are secured if the law operates upon all

alike and do not subject the individual to an arbitrary exercise of the powers of government."

Miller v. *Mayor of City of Birmingham*, 151 Ala. 469.

"The plaintiff was not denied the equal protection of the laws contrary to the Fourteenth Amendment of the Federal Constitution, which merely requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. A statute does not deny to a party the equal protection of the laws unless he is treated differently by it from others in the same condition."

Price v. *City of Elgin*, 257 Ill. 63.

"As we have no provision in our State Constitution securing in express terms the equal protection of the laws, the question thus raised is a question arising solely under the Fourteenth Amendment to the Federal Constitution. The rule in question of this kind is now so well settled by the decisions of the United States Supreme Court that no extended discussion is required. The rule is that, if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection."

West v. *City of Asbury Park*, 99 Atl. 190.

The rule of the Brotherhood is not aimed at and does not apply to the petitioner in this case alone and does not seek to establish arbitrary discriminations between one person and another. It applies to all employing painters within the whole territory of the United States who

undertake to do work outside of their home districts, and strikes them all alike.

Article 4, Sec. 2, of the Constitution of the United States, likewise is limited to state action and does not control the conduct of individuals.

In *Williams* v. *Bruffy*, 96 U. S. 176, 183, Mr. Justice Field said:

> "This provision has been held in repeated adjudications of this court, to prohibit discriminating legislation by one State against the citizens of another State, and to secure to them the equal protection of its laws, and the same freedom possessed by its own citizens in the acquisition and enjoyment of property. *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Ward* v. *Maryland*, 12 Wall. 418; *Paul* v. *Virginia*, 8 Wall. 168."

Similarly it was said in *Le Grand* v. *U. S.*, 12 Fed. 577, 583:

> "I refer to Section 2 of Article 4, which declares the citizens of each state should be entitled to all the privileges and immunities of citizens of the several states. But this section, like the Fourteenth Amendment, is directed against state action."

The same view was taken in *United States* v. *Harris*, 106 U. S. 629, 643:

> "But this section (the Court had referred to Section 2 of Article 4) like the Fourteenth Amendment, is directed against State action. Its object is to place the citizens of each State upon the

> same footing with citizens of other States and inhibit discriminative legislation against them by other States. *Paul* v. *Virginia*, 8 Wall. 168."

A more recent statement of the principle is found in *Maxwell* v. *Bugbee*, 250 U. S. 525, 537:

> "The provision quoted from Art. IV of the Constitution was intended to prevent discrimination by the several States against citizens of other States in respect of the fundamental privileges of citizenship."

In *U. S.* v. *Wheeler*, 254 U. S. 281, Chief Justice White held that the clause is intended to protect the privileges and immunities of citizens of each state against state action and is not violated by a wrongful prevention by an individual of the enjoyment of such privilege by a citizen of another state.

That the constitutional provision does not confer a right of protection against the acts of individuals, but is aimed at the hostile action of the states is also asserted in

> *Corfield* v. *Coryell*, 4 Wash. C. C. 381;
> *Slaughter-House Cases*, 16 Wall. 36;
> *Hodges* v. *United States*, 203 U. S. 1.

POINT V.

The cases in which the precise question was considered by other courts.

The question of the lawfulness of Sections 132 and 133 of the Constitution of the Brotherhood of Painters, Decorators and Paperhangers of America, which is in-

volved in this appeal, has been litigated and passed upon by many courts within the last five or six years.

The respondents respectfully submit a brief review of all such cases in chronological order as far as they could ascertain them.

The first of such cases was that of the *New Jersey Painting Company* v. *Local No. 26 et al.*, 122 Atl. Rep. 622.

That action arose over a difference between the wage rates in New York, N. Y., and in Newark, New Jersey.

A preliminary injunction was obtained, and such injunction was made permanent upon trial in an elaborate opinion by Vice-Chancellor Backes. An appeal was taken by the defendants from the decree of the said Vice-Chancellor to the New Jersey Court of Errors and Appeals, which reversed the lower Court, holding that the provisions of Sections 132 and 133 of the Brotherhood Constitution were not unlawful.

The Court said *inter alia*:

> "The mere combination of action is not the element which gives an illegal character to the act. It is the illegality of the purpose to be accomplished, or the illegal means used separately or in furtherance of the purpose, which makes the act illegal. *Lindsay & Company* v. *Montana Federation of Labor*, 37 Mont. 264, 273; 18 L. R. A. N. S. 707. *Vegelahn* v. *Guntner*, 167 Mass. 92, 98; 16 L. R. A. N. S., note page 85.
>
> The rule adopted and promulgated by the defendants is not aimed at and does not apply to the complainant solely. It does not seek to establish arbitrary discriminations between one person

or corporation and another. It applies to all employing painters within the whole territory of the United States, who undertake to do work outside of their home districts. It applies to all alike, automatically, who come within the prescribed rule. Cooperation in some form now seems to be an economic necessity, in all business, trades and occupations, throughout the United States, if not, throughout the entire world.

Nearly all the cases in this country quite uniformly hold, and the complainant seems to concede, that the union may arbitrarily fix a uniform scale of wages applicable to all its members and strike to enforce its demands, *i. e.*, either to maintain or advance a scale of wages; and the strike will not be interfered with by the courts, if it is lawfully carried on. *Bossert* v. *Dhuy*, 221 N. Y. 342. But the argument by the complainant followed by the learned Vice-Chancellor in this case seems to be based upon the idea, that the union cannot in good faith frame or adopt a rule providing for a sliding scale of wages, to fit ostensibly the varying local economic conditions throughout the United States, which in effect does discriminate against some employers, as a class, in the matter of wages to be paid. It seems to be based upon the ground that such regulations create an unfair restraint of trade. The attack is aimed not at the combination but at its effect upon the employer. This is unsound, both legally and economically. In the last analysis, the prime object of the rule attacked is to establish a standard of wages. It is hardly necessary to enter into any extended discussion, pointing out that in law or by analogy Article 4, Sec. 2 and Article 14, Sec. 1 of the Constitution of the United States,

are not applicable to private contracts. These sections are directed against state action only: *United States* v. *Harris*, 106 U. S. 643. Economically, the conclusion reached by the lower Court confuses the possible or probable effect of the defendant's action upon the employers with the defendant's rights. The law gives the defendants a right to sell their labor to whom they please, when and under such conditions as they may fix, individually or in combination. They may make rules and regulations passed in good faith providing for what they deem to be an economic advantage to themselves. If in the enforcement of such rules and regulations, they violate no law, but act solely for the declared purpose, the courts ought not and cannot legally enjoin them from such concerted action, simply, because, such action may affect some employers. How can it be said that such rules and regulations create an unfair restraint of trade? If the law gives the workers such rights, it must protect them in their employment. They cannot be enjoined from their use or interfered with by the courts. Employers have no vested interest in the labor of workers. We think the defendants, by the terms of the Statute of 1883, both its letter and spirit are within its protection. They are also within the protection of the law as declared in the cases cited. The cases, in which concerted action on the part of a body of workers has been held unlawful, have invariably been such, in which either the object sought to be attained had little or no bearing on the interest of the workers or in which the methods employed by them were in themselves unlawful."

The next suit of similar character was that of the *Barker Painting Company* v. *Brotherhood of Painters*,

Decorators & Paperhangers of America et al., in the Supreme Court of the District of Columbia.

In that suit a preliminary injunction was issued on April 9, 1924. On trial the injunction was dissolved and the bill dismissed by Associate Justice Smith in an elaborate opinion. On appeal to the Court of Appeals of the District of Columbia the said Court affirmed the judgment dismissing the bill (23 Fed. (2nd) 743).

The respondents quote the following portions of the unreported opinion of Justice Smith:

> "A conspiracy, unless otherwise defined by statute, is a combination of two or more persons by concerted action to accomplish a *criminal or unlawful purpose* or to accomplish by *criminal or unlawful means* a purpose not in itself criminal or unlawful. *Pettibone* v. *United States,* 148 U. S. 197, 203. Under that definition the defendants are not subject to the charge of conspiracy unless they combined to achieve an illegal purpose or sought by concerted action to accomplish a lawful objective by criminal or unlawful means.
>
> The purpose of labor unions to secure to their members higher wages and shorter hours of daily labor or less days of work for the week or month, is not unlawful. *Adair* v. *United States,* 208 U. S. 161, 174. Laborers and artisans individually have the indisputable right in this country to say upon what terms they will accept employment and the employer on his part is free to accept or reject the terms demanded for service. That which is the right of one laborer or artisan is the right of every other laborer or artisan, and if a thousand workers present without duress or threat a united demand that a certain wage be paid to each of

them for 8 hours of daily labor during a 5 or 5½ day week, they are no more engaged in an unlawful enterprise than is the individual laborer or artisan who makes the same terms a condition for his acceptance of employment.

Bad faith, an unlawful design, or unlawful methods to accomplish by concerted action a lawful end are the characteristics of every conspiracy, not otherwise defined by statute. Laborers or artisans who combine to demand a wage which will raise their standard of living or who combine to stabilize local wages or to maintain the local supply of labor, or to make less tempting the migration of labor to places having a lower cost of living, cannot be regarded as acting in bad faith, or with evil intentions, or for the consummation of an illegal purpose.

Union terms of service may be economically unsound and may strip the farm of labor by concentrating the workers in cities and towns. Such terms may advance the cost of living to the working man and everybody else, many times the increase in wages and produce complications immeasureably worse than the evils sought to be remedied. Nevertheless, just so long as collective terms are operative under like conditions and similar circumstances as to all localities and all employers, it cannot be said that combined or concerted action for higher wages and less work time is discriminatory or is designed for an unlawful or ulterior purpose. The collective fixing of a scale of wages and hours of labor may not conform to sound economics, but to make it illegal it must be in violation of governmental laws in force and effect.

As the defendants had the legal right to pre-

scribe upon what terms they would accept employment from all employers in all localities, and as they did not seek to compel the plaintiff by violence, threats, or any other unlawful means to agree to such terms, their concerted refusal to work unless the plaintiff paid the wages for the working time provided by the constitution of the Brotherhood, can not be regarded as a common law conspiracy."

In *Hass* v. *Local Union No. 17 of the Brotherhood*, 300 Fed. 894, the Court granted an injunction relying, as above set forth, on the opinion of Vice-Chancellor Backes in the case of *New Jersey Painting Company* v. *The Brotherhood*, which was subsequently reversed, and the preliminary injunction in the Supreme Court of the District of Columbia subsequently set aside.

In *George A. Douglas & Bros., Inc.*, v. *Clarence Mallette et al.*, a similar suit based upon the alleged unlawfulness of Sections 132 and 133 of the Brotherhood Constitution was dismissed, largely on the authority of the opinion of the New Jersey Court of Errors and Appeals in the *New Jersey Painting Company* case.

The case of *Marshall* v. *The Brotherhood* was brought in the Court of Common Pleas No. 1 of Philadelphia County in the month of March, 1925. It involved the same question.

After final hearing upon the bill, answer and replication, the Court dismissed the bill in an elaborate opinion, largely adopting the reasoning of the New Jersey Court of Errors and Appeals.

The case of *Barker Painting Company* v. *Brotherhood*, in the United States District Court for the Eastern

District of Pennsylvania, was instituted in the month of December, 1925.

The suit was dismissed on the merits upon trial and the decree of dismissal was affirmed by this Court.

In the instant case, the United States District Court for the Eastern District of New Jersey dismissed the appeal on the merits on April 14, 1926.

Counsel quotes the following illuminating statement from the opinion of Judge Runyon which is printed in full in the Transcript of Record herein (p. 28):

> "Counsel for the petitioner in the instant case contends that the combination itself constitutes the offense complained of; that while each individual member of the union, if acting alone, had and has an indisputable right to stop work, and all because his employer, coming from a higher jurisdiction wherein higher wages are paid, refuses to pay him that higher rate, yet the concerted action of the same individuals, seeking the same advantage for the same cause, and producing the same effect, constitutes, of itself, an offense, in that such combination takes the situation out of the domain of the privilege which is each man's inalienable right, and into the domain of relative rights wherein the employer, the workers, and the public are parties.
>
> If the entire transaction, as instituted by each individual member and carried to the point of actual cessation of work, is neither inherently bad nor constitutes an offense; if such transaction, duplicated a hundred times by that number of individuals, constitutes no such offense, it follows that the offense herein—if any there be—lies neither in the ultimatum of the individual worker,

nor in his withdrawal from his work, nor in the hundred other duplications of such procedure; nor in having, through such means, brought the employer's business to a standstill—a disastrous standstill, perhaps—but must arise from the fact that these individuals have not acted, each for himself, but collectively, and as members of an organization.

And even so, the trend of modern economic usage, both as practiced and as given expression in the courts, is increasingly against regarding combinations among laborers as unlawful *per se*, but narrows its condemnation to those combinations which are formed for the purpose of effecting an unlawful object, or the doing of a distinct injury to one against whom the activities of the combination may be directed.

Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant.

Gompers v. *Bucks Stove and Range Co.*, 221 U. S. p. 437.

Assuming, therefore, that a combination is not unlawful *per se*, inquiry must be directed to the ascertainment of the objects of the present combination, and the mode and method adopted in putting such objects into practice, whether or not they be lawful; and also to the effect thereby produced.

There are divers objects sought in the organization of labor; the betterment of general working conditions, the adoption of proper safety appliances, workmen's compensation in cases of injury and death, hours of labor, etc., etc. And by no

means the least of these objects is that one which deals with wages.

A reading of the rule adopted at Dallas furnishes ample proof that, in the minds of those who framed its terms, there was one main plan—that of increasing wages under certain conditions therein named. Whatever dispute there may be regarding these conditions, the fact must remain that there was in contemplation their utilization as a basis for wage increase.

By itself, the quest for increased wages is a lawful object; and, therefore, if in the present case, in connection with the object of securing increased wages there appears that which is unlawful, it is to be found in one or more of the following factors; either in the residential feature of the rule, or in the methods adopted in the attainment of the object, or in the effect which such attainment has produced."

POINT VI.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed, with costs.

Dated April 21, 1930.

MORRIS HILLQUIT,
Solicitor for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 477.—October Term, 1929.

Barker Painting Company, Petitioner, vs. Local No. 734, Brotherhood of Painters, Decorators, and Paperhangers of America, et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 19, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

For the purposes of the present decision this case may be stated as it is stated by the Circuit Court of Appeals. "The Barker Painting Company, a corporation of New York with its home office in New York City, had a contract for painting at Somerville, New Jersey. The job was about thirty per cent completed when the defendant union called off its men by force of the offending rules which require a contractor to pay the wage rate of his home district or that of the locality of the work, whichever is higher. The Barker Company filed the bill in equity in this case stating the facts and alleging unlawfulness of the rules because violative of sundry provisions of the federal constitution and federal laws. The trial Judge issued a preliminary injunction, mandatory in character in that it restrained the workmen from observing the union rules and from not returning to work. All the men save one obeyed the injunction, returned to work and completed the job." This happened before a decision upon the merits by the District Court, April 14, 1926, 12 F. (2d) 945, and a final decree dismissing the bill, March 23, 1928. The Circuit Court of Appeals, while intimating its probable adhesion to its former decision in a similar case, *Barker Painting Co.* v. *Brotherhood of Painters, Decorators and Paperhangers of America*, 15 F. (2d) 16, in accord with the decree below, declined to deal with the merits on the ground that it had become unnecessary to deal with them and for that reason affirmed the dismissal of the bill. 34 F. (2d) 3.

Both sides desired that the Court should go farther afield. But a Court does all that its duty compels when it confines itself to the controversy before it. It cannot be required to go into general propositions or prophetic statements of how it is likely to act upon other possible or even probable issues that have not yet arisen. See *Willing* v. *Chicago Auditorium Association*, 277 U. S. 274. The controversy here was between the plaintiff and the painters in Somerville who prevented its finishing its job. If the case had needed to be considered on its merits, it would have been likely to involve a discussion more or less far reaching of the powers of the Union, but the plaintiff could not impose a duty to go into that discussion when before the time for it the resistance had been withdrawn and the job had been done.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.